

86 - 1438

Supreme Court, U.S.

FILED

FEB 21 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO. _____

BOBBY ROY DENNIS, SR.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

SHEPPARD AND WHITE, P.A.
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201/27

QUESTIONS PRESENTED FOR REVIEW

1. Do black males constitute a cognizable group whose exclusion, as black males, from jury service in a criminal case through the Government's use of peremptory challenges implicate the principles espoused in Batson v. Kentucky, 476 U.S. _____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)?

2. In a criminal case, does the fact that the prosecutor did not exclude all blacks, or as many blacks as possible, from the jury through use of peremptory challenges necessarily preclude an inference of discrimination in the prosecutor's challenges to the blacks who were excluded?

PARTIES TO THE PROCEEDINGS BELOW

In addition to Bobby Roy Dennis and the United States of America, the following people were parties to the proceedings in the Eleventh Circuit Court of Appeals:

Brenda Jewell Hurley
Sharon Denise Cohen
Clarence Bobby Jennings

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OPINIONS BELOW

The initial decision of the Eleventh Circuit Court of Appeals was rendered April 14, 1986, and is reported at United States v. Dennis, 786 F.2d 1029 (11th Cir. 1986). On November 24, 1986, the panel granted in part and denied in part the petitioner's petition for rehearing. That opinion is reported at United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986).

JURISDICTIONAL STATEMENT

The initial judgment of the Eleventh Circuit Court of Appeals was entered April 14, 1986. On November 24, 1986, the panel, on rehearing, granted in part and denied in part the petition for rehearing. On December 24, 1986, the petition for rehearing en banc was denied.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Section One of the Fourteenth Amendment to the United States Constitution provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was charged with, and convicted of: engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (1982); conspiring to possess with intent to distribute controlled substance, in violation of 21 U.S.C. § 846 (1982); and using a communication facility to facilitate the § 846 conspiracy, in violation of 21 U.S.C. § 843(b) (1982).

The jurisdiction of the district court derived from 18 U.S.C. § 3231.

The petitioner, Bobby Roy Dennis, Sr., and nine co-defendants were indicted September 13, 1984, in a twenty-two count indictment [R. 1, 23].

Count one charged the petitioner with conspiracy to distribute and to possess with intent to distribute controlled substances, including heroin, cocaine,

marijuana, and talwin. Counts two, three, eight, nine, eleven, twelve, fifteen, sixteen and seventeen charged possession with intent to distribute and to cause to be possessed with intent to distribute heroin and cocaine. Counts ten and fourteen charged possession with intent to distribute and to cause to be possessed with intent to distribute heroin, cocaine and marijuana. Count five charged the petitioner with the use of a telephone facility to commit a felony. In count seven, the petitioner was charged with engaging in a continuing criminal enterprise (CCE) and that count also sought the forfeiture of his home located at 2504 Spring Park Road, Jacksonville, Florida. Count seven (CCE) identified counts one through nineteen as predicate offenses of that count. Counts thirteen, eighteen and nineteen charged possession with intent to distribute cocaine.

The case proceeded to trial, minus three co-defendants who pled guilty prior to trial and testified for the prosecution. A fourth co-defendant, Anthony Jerome Stinson, was a fugitive during trial.

Jury selection began on December 3, 1984, with the district court conducting voir dire of the jurors.

During jury selection, the prosecution used peremptory challenges to strike three black males: Patten [Tr. 22, 26] and Thompson [Tr. 22, 27] from the regular jury, and Williams [Tr. 22, 30] as an alternate. No black male served on the jury. The petitioner, the target defendant at trial, is a black male.

After each black male was challenged by the Government, counsel for the petitioner objected and requested the trial court to inquire as to the Government's reasons for striking these apparently-qualified blacks from the jury. These requests were denied.

On appeal to the Eleventh Circuit Court of Appeals, the petitioner raised the discriminatory challenge issue in a supplemental brief based on the then-recent opinion of the Second Circuit Court of Appeals in McCray v. Adams , 750 F.2d 1113 (2nd Cir. 1984). The Eleventh Circuit, relying on Swain v. Alabama , 380 U.S. 202 (1965), rejected the reasoning of the McCray court. United States v. Dennis , 786 F.2d 1029, 1048-49 (11th Cir. 1986). The petitioner requested rehearing and rehearing en banc, relying on the intervening decision of this Court in Batson v. Kentucky , 476 U.S. _____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The panel below held that Batson did not apply to the facts of the instant case. United States v. Dennis , 804 F.2d 1208 (11th Cir. 1986), and denied rehearing and rehearing en banc. This petition followed.

ARGUMENT

During jury selection, the prosecution used peremptory challenges to strike three black males: Patten [Tr. 22, 26] and Thompson [Tr. 22, 27] from the regular jury, and Williams [Tr. 22, 30] as an alternate. No black male served on the jury. The petitioner, the target defendant at trial, is a black male.

After each black male was challenged by the Government, counsel for the petitioner objected and requested the trial court to inquire as to the Government's reasons for striking these apparently-qualified blacks from the jury. These requests were denied.

An examination of the record of the voir dire reveals no racially-neutral justification for striking these veniremen. In fact, Williams stated he had been called by the Government as a witness in criminal prosecutions [Tr. 21, 74]. This background would likely make Williams more sympathetic

to the prosecution. Williams has also been the victim of a burglary, an experience unlikely to endear the criminally-accused to him [Tr. 21, 153-154]. Similarly, Patten's mother was the victim of a burglar [Tr. 21, 130]. Three of the four strikes exercised by the Government were used against blacks.

Nothing whatever in the record provides any explanation for the Government's refusal to allow any of these men to serve as jurors in this cause, other than the fact that they are black males, and the appellant is a black male.

On direct appeal, the petitioner was allowed to file a supplemental brief on the peremptory challenge issue, based on the decision by the Second Circuit Court of Appeals in McCray v. Adams, 750 F.2d 1113 (2nd Cir. 1984), an opinion rendered after the initial brief was filed. The McCray Court, relying on the Sixth Amendment guarantee of a fair cross-section in the

petit jury, held that the prosecution may not use peremptory challenges to exclude a cognizable group in the community from the jury. Under McCray, to make out a prima facie case of discriminatory jury challenges, the defendant must show, first, that "the group alleged to be excluded is a cognizable group in the community", and second, that "there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliations" rather than because of the ability to hear and decide the case based on the evidence presented. 750 F.2d at 1131.

In its initial opinion, the Eleventh Circuit panel rejected the McCray analysis and relied instead on the then-viable rule of Swain v. Alabama, 380 U.S. 202 (1965) 1/. Swain, an equal protection case,

1/ The panel noted that five members of

required a showing that blacks have been completely excluded in "case after case" before a prima facie case of discrimination in the use of a prosecutor's peremptory challenges could be found. 380 U.S. at 223-24. The Eleventh Circuit held that the petitioner's argument failed the difficult test established in Swain. United States v. Dennis, 786 F.2d 1029, 1048-49 (11th Cir. 1986). The petitioner filed a motion for rehearing and rehearing en banc, urging that the intervening decision by this Court in Batson v. Kentucky, 476 U.S. _____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) required a different resolution of the jury challenge issue. In Batson, this Court

1/ (cont.) this Court had expressed doubt about the continuing vitality of Swain, citing McCray v. New York, 461 U.S. 961 (1983). The panel also observed that certiorari had been granted in Batson v. Kentucky, 471 U.S. _____, 105 S.Ct. 2111 (1985). Nevertheless, the panel decided the jury challenge issue on the rule of Swain, without awaiting further guidance from this Court.

overruled the relevant portion of Swain v. Alabama.

This Court, in Batson, declined the opportunity to avoid the precedent set in Swain by deciding the case on Sixth Amendment grounds as had the McCray court. Instead, this Court's opinion was grounded squarely on the equal protection clause, and thus confronted the Swain rule directly. The Court observed that the decision in Strauder v. West Virginia, 100 U.S. 303 (1880) made clear long ago that placing a black defendant on trial before a jury from which members of his race had been purposefully excluded denied the defendant equal protection of the laws. 90 L.Ed.2d at 79-80. A defendant has a right to trial by a jury selected pursuant to non-discriminatory criteria. Id., citing, Martin v. Texas, 200 U.S. 316, 321 (1906); Ex parte Virginia, 100 U.S. 339, 345 (1880). This Court reiterated that the equal protection clause forbids the state

(or government) to exclude members of the defendant's race from the venire on account of race, or "on the false assumption that members of his race are not qualified to serve as jurors." Id. Race, the Batson Court stated, is simply "unrelated to his fitness as a juror." Id., quoting, Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946).

The Court ruled that because "Swain has placed on defendants a crippling burden of proof," the Swain standard must be rejected "as inconsistent with standards that have been developed since Swain for assessing a prima facie case under the Equal Protection Clause." Id. at 85.

The quorum of the Eleventh Circuit panel 2/, on rehearing, struck the portion of its previous opinion which related to

2/ One of the members of the panel which heard oral argument, Judge Tuttle, was prevented by illness from participating in the decision.

the Government's use of peremptory challenges during jury selection. United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986). The quorum, in its substituted opinion, held that the recent decision by this Court in Batson did not alter the result. The quorum made two specific, though related, findings in support of its ultimate holding. First, the court held, black males do not constitute a cognizable group whose purposeful exclusion would implicate the Fourteenth Amendment. Second, the quorum found that since the Government left two black females on the jury while using only three of the six peremptory challenges it was allowed, it was "thus obvious that the Government did not attempt to exclude all blacks, or as many blacks as it could, from the jury." 804 F.2d at 1211. Each of these rulings is at war with the principles espoused in Batson, and conflicts with this Court's subsequent ruling in Griffith v. Kentucky,

____ U.S. _____, 55 L.W. 4089 (1987), as well as with another decision of the Eleventh Circuit in United States v. David, 803 F.2d 1567 (11th Cir. 1986).

Black Males as a Cognizable Class

The quorum below ruled that black males do not "constitute a distinct, recognizable subclass of individuals who have been singled out for different treatment under the laws." 804 F.2d at 1210. Thus, the prosecutor's use of peremptory strikes to exclude all black males from the jury did not contravene the equal protection clause or the defendant's right to a fair cross-section of the community on the jury.

The fault in the court's reasoning is its unduly narrow interpretation of the concept of a cognizable group. The court apparently believed that the question was whether the appellant was a member of "a cognizable racial group," as defined in Castaneda v. Partida, 430 U.S. 482 (1977).

Ibid. (emphasis supplied). The applicable concept is broader than that.

A "cognizable" group, for Batson purposes, is not limited to race. Sex is included. In Taylor v. Louisiana, 419 U.S. 522 (1975), the defendant, a male, challenged the petit jury venire from which his jury was to be selected. It was stipulated that while 53% of the relevant population eligible for jury service were female, only 10% of the people on the jury wheel in the parish were female. It was further stipulated that the discrepancy between the number of females eligible for jury service and those actually included in the venire was the result of a Louisiana statute which provided that a woman should not be selected for a venire unless she had filed a written declaration of her desire to serve as a juror. 419 U.S. at 523-24. Underlying this Court's holding that the statute operated to violate the defendant's constitutional rights was "the judgment

that women are sufficiently numerous and distinct from men and that if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied." Id. at 531. This Court re-affirmed Taylor in Duren v. Missouri, 439 U.S. 357 (1979). In Duren, this Court invalidated a state statute which automatically exempted women from jury service upon request.

Since it is indisputable that both males and blacks are "cognizable" groups, it follows that the coincidence of racial and sexual identity in the group of black males renders that group "cognizable" within the comprehension of the Sixth and Fourteenth Amendments. Taking as a given that blacks are a group separate and distinct from whites, Taylor and Duren make clear that black males, as males, are sufficiently separate and distinct from black females, as females, to preclude the

exclusion of black males from a jury for reasons based on race and sex.

The only case on point of which the petitioner is aware is People v. Motton, 704 P.2d 176 (Cal. 1985), in which the California supreme court held that black females are a cognizable group for purposes of the Sixth and Fourteenth Amendments. The quorum below erred in limiting Batson to racial groups.

The Need for Total Exclusion of a "Cognizable" Group

Assuming arguendo that black males do not constitute a "cognizable" group, the quorum's ruling conflicts with Batson and Griffith by holding that since the prosecutor did not attempt to exclude all blacks from the jury, there could be no Batson violation. The quorum stated:

The government utilized only three of the six peremptory challenges it was allowed during the selection of the twelve jurors who decided the

case, and one of the two challenges to alternates that it was allowed. The government exercised two of the three challenges it exercised when selecting regular members to strike potential jurors who were black, and used the one challenge it chose to exercise when selecting alternate jurors to strike an alternate who was black, but eventually accepted a jury that included among its regular members two blacks. It is thus obvious that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury. Moreover, the unchallenged presence of two blacks on the jury undercuts any inference of impermissible discrimination that might be argued to arise from the fact that the prosecutor used three of the four peremptory challenges he exercised to strike blacks from the panel of potential jurors and alternates.

804 F.2d at 1210-1211 (emphasis supplied).

The Eleventh Circuit's interpretation of

Batson places its decision in conflict with Griffith.

Although the primary question presented in Griffith was whether the Batson rule should be applied retroactively, the decision, by necessary implication, controls the instant case.

In Griffith, during voir dire, the prosecutor used four of its five available challenges to strike only four of the five prospective jurors who were black. Defense counsel moved to have the panel discharged, "alleging that the prosecutor's use of peremptory challenges to remove all but one of the prospective black jurors constituted a violation of Griffith's Sixth and Fourteenth Amendment rights." 55 L.W. at 4089 (emphasis added). Holding that Batson was retroactive, this Court reversed the affirmance of the defendant's conviction by the Kentucky Supreme Court. Id. at 4092. Clearly, unless a prima facie Batson violation had been made out by the above-

recited facts, it would have been unnecessary for this Court to consider whether Batson applied. Thus, the sure implication of Griffith is, contrary to the holding of the panel below, that to raise the inference of a prosecutor's discriminatory use of peremptory challenges, it is not necessary that the prosecutor exclude as many members of the protected group as it can. The decision in Batson itself restates the principle that a " 'single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions'." 106 S.Ct. at 1722, quoting, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n. 14 (1977). As the Eleventh Circuit has observed under comparable facts:

Batson rejects the view in Swain that the Equal Protection Clause only requires that black citizens not be deprived of jury service by being

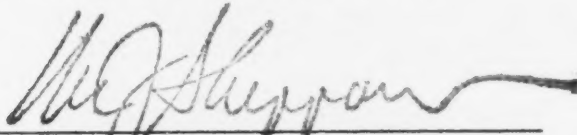
systematically excluded from petit juries; Batson rests on a rationale that blacks are entitled not to be struck for racial reasons, and black defendants are entitled to be tried in a system free of racially exclusionary practices. This represents more than a group entitlement not to be entirely excluded from participation. Rather, under Batson, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown.

United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986). Accord, Fleming v. Kemp, 792 F.2d 1478 (11th Cir. 1986). The Court in Batson rejected the Swain rule that a defendant's rights must be violated consistently and repeatedly before the Constitution provides a remedy. The Batson decision stands for the proposition that invidious discrimination may play no part

at all in the jury selection process. The quorum's narrow application of Batson undercuts the salutary purpose of the decision. Under the reasoning of the quorum below, a prosecutor may strike every black venireman, save one, for no other reason than that they are black, and yet avoid constitutional prohibitions. This Court should grant the petition for writ of certiorari on this issue to prevent this serious erosion of the principles espoused in Batson.

Respectfully submitted,

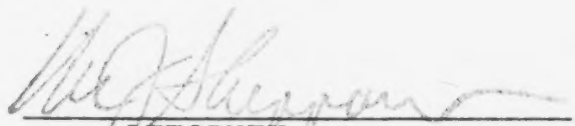
SHEPPARD AND WHITE, P.A.

A handwritten signature in dark ink, appearing to read "Michael J. Sheppard", with a long horizontal flourish extending to the right.

215 Washington Street
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Solicitor General, Department of Justice, Tenth and Constitution, N.W., Room 5143, Washington, D.C. 20530; M. Alan Ceballas, Esquire, Assistant United States Attorney, P. O. Box 600, Jacksonville, Florida 32201; Howard W. Skinner, Esquire, Thomas and Skinner, P.A., 221 East Church Street, Jacksonville, Florida 32202; Brent D. Shore, Esquire, 4151 Woodcock Drive, Suite 101, Jacksonville, Florida 32207; and Eugene Murphy, Esquire, 1835 North Third Street, Jacksonville Beach, Florida 32250; by mail, this 20th day of February, 1987.



ATTORNEY

No. _____

86 - 1438

2

Supreme Court, U.S.

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IN THE
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BOBBY ROY DENNIS, SR.,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

APPENDIX
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bobby Roy DENNIS, Sr., Sharon Denise
Cohen, Clarence Bobby Jennings, Brenda
Jewell Hurley, Defendants-Appellants.

No. 85-3089.

United States Court of Appeals,
Eleventh Circuit.

April 14, 1986.

William J. Sheppard, Courtney L.
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Brent D. Shore, Jacksonville, Fla.,
for Cohen.

Eugene F. Murphy, Jacksonville Beach,
Fla., for Jennings.

Howard W. Skinner, Jacksonville, Fla.,
for Hurley.

M. Alan Ceballos, Asst. U.S. Atty.,
Jacksonville, Fla., for U.S.

Appeals from the United States
District Court for the Middle District of
Florida.

Before HILL, Circuit Judge, and TUTTLE
and HENDERSON *, Senior Circuit Judges.

HILL, Circuit Judge:

* See Rule 3(b), Rules of the U.S. Court of
Appeals.

This is an appeal from defendant-appellants' convictions and sentences on various narcotics-related charges. The defendants were indicted along with six other individuals, five of whom pled guilty and one of whom remained a fugitive through trial, in a twenty-two count indictment in September of 1984. The defendants filed numerous pre-trial motions, two of which - a motion to suppress certain evidence filed by one defendant and a motion for a continuance filed by another - are relevant to this appeal. Both of those motions were denied.

The jury found all four of the defendants guilty of the offense alleged in Count One of the indictment, which charged them with a five year long conspiracy "to knowingly, willfully and intentionally distribute and possess with intent to distribute quantities of controlled substances, including heroin, cocaine, marijuana, and talwin," in violation of 21

U.S.C. § 846 (1982). Each defendant was also convicted of one or more substantive narcotics offenses. In addition, appellant Bobby Roy Dennis was convicted of engaging in a continuing criminal enterprise that yielded him substantial income and resources, in violation of 21 U.S.C. § 848 (1982), and using a communication facility to facilitate the conspiracy set forth in Count One, in violation of 21 U.S.C. § 843(b) (1982). Appellants Sharon Denise Cohen and Clarence Bobby Jennings were also convicted of making false and material declarations to a federal grand jury, in violation of 18 U.S.C. § 1623 (1982). The sentences imposed will be discussed where relevant below.

FACTS

The evidence at trial established that appellant Bobby Roy Dennis, Sr. (hereinafter referred to as "Dennis") and Johnny Bernard McClenton, a codefendant who pled guilty and testified at trial, jointly

supervised and controlled a massive and highly lucrative five year narcotics distribution enterprise. The enterprise enlisted the assistance of a succession of young women who would package and store the drugs in their homes or apartments, frequently in return for the payment of their rent or other household expenses. The organization also employed street level "lieutenants" who would retrieve the packaged narcotics from the homes in which they were processed and stored and deliver them to street level sellers.

In exchange for financial remuneration, appellant Brenda Jewell Hurley (hereinafter referred to as "Hurley") stored marijuana, cocaine and heroin in her apartment for several months in 1982, during which time the enterprise operated out of that location. Appellant Sharon Denise Cohen (hereinafter referred to as "Cohen"), acting as a street level seller, sold cocaine and heroin out of her

home. Appellant Clarence Bobby Jennings (hereinafter referred to as "Jennings") was a street level lieutenant.

On the first day of appellants' trial, the court conducted a lengthy voir dire examination of potential jurors. In response to questions from the court that were directed at learning whether any of the potential jurors harbored any improper bias as a result of their opinions about illicit drugs - or had developed any prejudice as a result of their exposure to any pre-trial publicity concerning the case, five jurors stated that they might not be able to render an unbiased decision because of previous experiences unrelated to the case at bar. Following further voir dire examination of the panel by the court, those jurors were excused.

The evidence presented by the government at trial consisted principally of the testimony of a host of witnesses who had been employed in various capacities by

the criminal enterprise. Written plea agreements between the government and two of those witnesses were introduced into evidence by the government over defense objections. Dennis and Cohen were also implicated in a diary/financial ledger that had been kept by one of the street lieutenants during his tenure with the organization and was introduced at trial. The prosecution's case against Dennis was further supported by a tape recording of a telephone conversation that had been intercepted pursuant to a 1980 court authorized wiretap. Dennis' pre-trial motion to suppress the recording had been denied.

Further facts will be provided where relevant to the analysis below.

DISCUSSION

Appellants raise numerous claims of error on this appeal. We will discuss the following issues raised by those claims in

the order in which we have listed them below:

(1) Whether the trial court erred in admitting into evidence the tape recording made pursuant to a court authorized wiretap in 1980.

(2) Whether the trial court erred in sentencing Hurley, Cohen and Jennings on Count One in the absence of a special verdict indicating which drugs were found by the jury to have been objects of the conspiracy.

(3) Whether appellants Jennings and Cohen waived any right to object to the testimony of the grand jury foreman regarding the materiality of allegedly false statements they made before the grand jury. —

(4) Whether the trial court abused its discretion in its conduct or voir dire.

(5) Whether the trial court erred in admitting into evidence the written plea agreements of two government witnesses.

(6) Whether the trial court erred in denying appellant Hurley's motion for a mistrial after the prosecutor commented on Hurley's character in his rebuttal argument.

(7) Whether the trial court erred in denying appellant Dennis' motion to inquire of the government into the reasons for its exercise of three of its peremptory challenges.

The remainder of the claims raised by appellants are clearly without merit and are addressed together in Part VIII below.

I. ADMISSIBILITY OF WIRETAP EVIDENCE

The government was permitted to introduce into evidence a tape recording of a telephone conversation between Dennis and David Weinstein, the owner of a local pharmacy, in which Dennis asked Weinstein whether he could provide Dennis with a large quantity of Talwin, a Schedule I

narcotic substance. The recording was made on August 1, 1980, pursuant to a court authorized wiretap on a telephone located at the residence of Bonnie Joyce Phelps (a/k/a Bonnie Joyce Jackson). On July 16, 1980, as part of an investigation into essentially the same criminal enterprise that is the subject of this case, Assistant United States Attorney Thomas E. Morris had applied for and received authority to intercept and monitor communications over the home telephone lines of Dennis and Phelps, who was then Dennis' girlfriend.¹ Attached to and made a part of that application by reference was an affidavit

¹ The government has stated that the 1980 wiretap did not yield evidence sufficient to warrant prosecution then, and that the investigation was terminated shortly thereafter. The investigation was reactivated in 1984 with an extensive grand jury investigation. During the grand jury inquiry it became clear that one intercepted conversation might be relevant as evidence in this case. It is for that reason that the conversation that is at issue here was intercepted so far in advance of prosecution.

executed by Federal Bureau of Investigation Special Agent Dennis Erich, setting forth, inter alia, the reasons why it was believed that alternative investigative techniques would not achieve the objectives the wiretap could achieve. On July 28, Morris filed a second application seeking authority to intercept communications over Phelps' telephone line at a new address to which she had moved. The court granted the application, resulting in the interception of the conversation between Dennis and Weinstein on August 1. The July 28 application included an affirmation of the applicant's belief that "normal investigative procedures appear unlikely to succeed," and incorporated by reference the prior affidavit of Special Agent Erich, which was said to "explain[] why normal investigative procedures have failed or reasonably appear unlikely to succeed if

continued, or reasonably appear unlikely to succeed if tried."2

Appellant Dennis challenges the legal sufficiency of the July 28 application on this appeal, arguing that it fails to satisfy the statutory requirement that a wiretap application include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c) (1982). Appellants claim support for their position in dicta from this court's opinions in United States v. Bascaro, 742 F.2d 1135 (11th Cir.1984), and United States v. Domme, 753 F.2d 950 (11th

2 The July 28 application and supporting affidavits also set forth in considerable detail the facts alleged to constitute probable cause to believe that the electronic monitoring for which authority was sought would secure important evidence of unlawful activity.

Cir.1985). In both of those cases we approved the incorporation by reference of prior affidavits in an amended application that had been made necessary only because of a change in telephone number at the same address. In both cases the court distinguished amended applications arising from a change in the address of the person whose conversations were being intercepted. Indeed, the Domme court stated:

Appellants point to Bagley v. State, 397 So.2d 1036 (Fla.App.1981), and Wilson v. State, 377 So.2d 237 (Fla.App.1979), which held amended applications to be insufficient as a matter of state law when they merely incorporated information contained in earlier applications. Their argument, however, is foreclosed by our decision in Bascaro. There, the government obtained an amended wiretap order, which was sought by incorporating the original application, because the subject of the wiretap had changed one of his phone numbers before electronic surveillance had begun. Appellants in Bascaro raised the identical argument presented here. In distinguishing Wilson and Bagley, the Bascaro court observed that both of those cases involved the wiretap subject's change in residence. 742 F.2d at 1347-48; see Bagley, 397 So.2d at 1038; Wilson, 377 So.2d at 238-39. In such circumstances, incorporation of an

original application by reference does not satisfy the requirement imposed by federal and Florida statutes that the application contain a complete statement about why alternative investigative procedures have been unsuccessful, or would be futile or too dangerous. 742 F.2d at 1347-48; see Fla.Stat. Ann. § 934.09(1)(c) (West 1973); 18 U.S.C. § 2518(1)(c). A mere change in telephone number without change in residence could not have affected the efficacy of alternative methods of investigation. 742 F.2d at 1348. Thus we conclude, as did the Bascaro court, that the failure to restate the information contained in the initial application did not violate Florida law.

Domme, 753 F.2d at 955. According to Dennis, this court in Domme and Bascaro correctly recognized that, to satisfy the requirements of 21 U.S.C. § 2518(1)(c), an amended application seeking to continue previously authorized monitoring of a person's telephone at another location must include a new statement of the reasons why other investigative procedures are unlikely to succeed at the new location, and may not incorporate by reference such information from a previously prepared affidavit which refers to the original location.

[1, 2] Appellant urges a per se rule, however, in a context in which one is neither necessary nor desirable. The dicta of Domme, to the extent it supports such a rule, is simply too sweeping in its condemnation of the practice of incorporating prior affidavits, where relevant, into wiretap applications. We have previously observed that "the purpose of the requirement in section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." United States v. Pacheco, 489 F.2d 554, 565 (5th Cir.1974), cert. denied, 421 U.S. 909, 95 S.Ct. 1558, 43 L.Ed.2d 774 (1975).³ As its

³ The Eleventh Circuit has adopted as precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc). All Fifth

legislative history indicates, the statute contemplates that "the showing be tested in a practical and commonsense fashion." S.Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin.News pp. 2112, 2190, quoted in United States v. Alfonso, 552 F.2d 605, 611 (5th Cir.), cert. denied, 434 U.S. 857, 98 S.Ct. 179, 54 L.Ed.2d 129 (1977). It will indeed often be the case that the information contained in an earlier affidavit that has been incorporated by reference into a second wiretap application will not suffice to inform the issuing judge of the difficulties involved in the use of alternative investigative techniques at the new location. It is the nature of the information that is provided, however, and not the means by which it is incorporated into the application, which determines whether the information constitutes "a full

3 (cont.) Circuit decisions cited in this opinion are binding upon this panel.

and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 21 U.S.C. § 2518(1)(c) (1982). The fact that some or all of the information has been incorporated by reference is alone irrelevant. Further, the information provided in the second application may satisfy the substantive requirement of section 2518(1)(c) without providing any additional explanation, applicable exclusively to the new location, of reasons why alternative investigative procedures are not likely to succeed there, since information that adequately informs the issuing judge of the limitations of alternatives to electronic surveillance in a given case may well apply to

communications facilities at more than one location.4

[3] In this case, Special Agent Erich's initial affidavit, which was incorporated by reference into the application at issue here, included the following information:

Need for Interception

The information developed thus far in this investigation has come from confidential sources, physical surveillances and court authorized pen registers. These investigative techniques have to date not succeeded in providing sufficient evidence to sustain successful prosecution of all of the principals in this matter, nor have they disclosed the identities of

4 Such an approach is consistent with that taken in Bascaro and Domme, despite some unnecessarily broad language in the latter to the contrary. Both cases rejected excessively formalistic approaches in situations in which the change in circumstances that necessitated the amended applications could not have affected the efficacy of alternative methods of investigation. In this case, too, we decline to find section 2518(1)(c) to require a mere change in the form in which the necessary information is provided to the issuing judge, as long as the information that is provided is sufficient to serve the purposes of the statutory provision.

all persons involved, or the source of controlled substances. These investigative techniques have not been successful in providing sufficient information of evidentiary value concerning transfer of narcotics, obtaining money for narcotics operations or the content of conversations between the principals concerning their criminal activities. It does not appear that the continued use of these normal investigative techniques is likely to be sufficiently successful in the future for the following reasons:

Confidential sources mentioned herein all have stated they will not testify about the information they have provided for fear of their personal safety, as well as personal recriminations that would be forthcoming if it were known that they have provided this information. In addition, all confidential informants have been contacted and refused to engage in the consensual monitoring of their conversations with individuals in this investigation. Special Agent Dennis P. Erich and other Special Agents of the Federal Bureau of Investigation, Bureau of Alcohol, Tobacco and Firearms and duly sworn law enforcement officers of the State of Florida, have instituted numerous surveillances in the past six months in an attempt to determine the extent of the narcotics distribution operation. The principals in this matter are extremely cognizant of law enforcement physical surveillance [as] evidenced by their routine utilization of a wide variety of vehicles in their contacts with their associates. Through recent physical surveillance

and Department of Motor Vehicle inquiries, it has been determined that Bobby Roy Dennis has registered to him seven motor vehicles and has access to and uses numerous others. It has been determined also through physical surveillances that Bobby Roy Dennis changes vehicles regularly in the course of his contacts with his associates and frequently rotates the license plates on the various vehicles at his disposal. In addition, physical surveillances and pen registers utilized in this investigation show that the activities of Bobby Roy Dennis and his associates in furtherance of their operation have no set pattern. These individuals are active at varying times, day and night, seven days a week, and their activities typically involve evasive use of vehicles.

It is felt that the use of a Grand Jury to subpoena Bobby Roy Dennis and others, the interviewing of these individuals and the subpoenaing of the telephone records of these individuals would not be productive in this investigation and would be unfavorable due to the fact that such questions will alert the subjects of this investigation and cause a change in the method of their operations.

Search warrants were conducted on two occasions, March 7, 1980, and March 21, 1980, at a bar owned by Bobby Roy Dennis and even though a quantity of heroin and cocaine was recovered, this evidence failed to reveal the full extent of this operation and offer sufficient evidence to indict the principals in this matter.

Branson O. Arflin, Sr., has been the target of criminal investigations by various law enforcement agencies in the Jacksonville area. The Jacksonville Office of the Federal Bureau of Investigation has attempted on two occasions in the past five years to infiltrate alleged criminal activities on the part of Arflin and his associates with unsuccessful results. The Jacksonville Sheriff's Office has assisted in these efforts in addition to their own numerous investigations of Arflin and his associates. Information regarding Arflin financially backing various narcotics operations in the Jacksonville area has been known to the Drug Enforcement Administration at Jacksonville, but their efforts to infiltrate these operations have been unsuccessful. Arflin and his associates have been the subject of several investigations by the Alcohol, Tobacco and Firearms Office at Jacksonville for alleged violations of Federal Firearms Statutes. No major investigations have been successful to date by Alcohol, Tobacco and Firearms regarding Arflin or his associates.

.

This interception is necessary in order to identify other individuals who are involved with Bobby Roy Dennis, Sr., Branson O. Arflin, Sr., also known as Bill Arflin, Ernest Gibson, Jr., Tammy Almon, Willie Lee Bartley, Anthony Jerome Stinson, James Alfred Clark, Steve Almon, Daryl Lamont McClenton, Joseph Hill, Bobby Roy Dennis, Jr., Lamar Solomon and Eddie Lee Grant, Jr., and others yet unknown who are involved in the above

enumerated offenses, and attempt to show the full scope of their operation and develop additional evidence necessary for the successful prosecution of the principals and conspirators.

. . . .

Based on personal knowledge of the facts of this investigation, information furnished by other Special Agents of the Federal Bureau of Investigation, Bureau of Alcohol, Tobacco and Firearms and duly sworn law enforcement officers of the State of Florida, and the manner in which the violations enumerated herein are carried out, the interception of wire communications, combined with cautious and discreet physical surveillances, appears to be the only available investigative technique which has a reasonable likelihood of securing the evidence necessary to fully identify the greatest number of persons involved in committing the above-enumerated offenses with the persons listed above, to fully show the scope of the conspiracy and criminal offenses listed, and to obtain sufficient evidence to prove the elements of those offenses listed.

Special Agent Erich's affidavit, as incorporated into the July 28 application at issue in this case, easily constitutes "a full and complete statement as to whether or not other investigative procedures have been tried and failed or

why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 21 U.S.C. § 2518(1)(c) (1982). Appellant Dennis has suggested no plausible factual basis for a finding that this affidavit, initially prepared to accompany the July 16 application to monitor Dennis' home telephone and Phelps' telephone at her previous address, is not also sufficient to advise the issuing judge of the limitations of investigative alternatives to electronic surveillance at the new address. Although the affidavit does not refer to the new address, we find the information that is contained therein and thus incorporated by reference into the July 28 application to be sufficient to satisfy the substantive requirement of section 2518(1)(c), as applicable to the government's July 28 request.

If the need for electronic surveillance to satisfy the investigation's objectives had initially arisen as a result

of characteristics of the place where the communication facility was then located, we would obviously have a very different case. In this case, however, it was the nature of the suspected activity being investigated as well as the information about that activity that was being sought that substantiated the wiretap applicant's claim that electronic surveillance was necessary. The information provided in the initial affidavit thus applied as fully to the new address as it did to the old one, and the government in the July 28 application was not required to provide any additional information in order to comply with the federal wiretap statute.

II. THE SPECIAL VERDICT ISSUE

The jury found Hurley, Cohen and Jennings guilty of the offense charged in Count One of the indictment, which alleged that over a five year period they, along with others, "did knowingly, willfully and intentionally combine, conspire,

confederate, and agree together ... to knowingly, willfully and intentionally distribute and possess with intent to distribute quantities of controlled substances, including heroin, cocaine, marijuana, and talwin, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846."⁵ Hurley, joined by Dennis, had requested that the jury be asked to return a special verdict on this count of the indictment, specifying which of the object drugs were found by the jury to have been objects of the distribution conspiracy in the event a

⁵ The jury also found Dennis guilty of the offense charged in Count One of the indictment. The trial court vacated Dennis' conviction on Count One, however, in light of his conviction of the continuing criminal enterprise count. See Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977).

guilty verdict was returned on Count One.6
Hurley's request was opposed by the
government and was denied.7 The maximum
term of imprisonment that could be imposed
on a first-time drug offender for a
conspiracy that occurred when the

6 Jennings and Cohen did not join in this
request. The government has not argued
that the request made by Hurley and Dennis
was insufficient to preserve the issue
insofar as their sentences are concerned,
so we need not consider that question at
this time.

7 In particular, counsel for the
government argued as follows:

I oppose [the request for a special
verdict.] I don't think the law
requires it. I think the conspiracy
law does not require them to find that
they knew what every other arm of the
conspiracy was doing. They can be
guilty of the conspiracy if they aided
and abetted the conspiracy, if they
were a member for a short period of
time for the conspiracy. It doesn't
require them to have knowledge of what
Bobby Dennis was doing with David
Weinstein, it doesn't have - require
Brenda Hurley to have knowledge of
what was happening out on Second and
Market when she wasn't there. I would
oppose that. I think the general
verdict form is sufficient.

conspiracy proved in this case occurred and whose object was possession with the intent to distribute less than 1,000 pounds of marijuana is five years, while up to fifteen years may be imposed for a similar conspiracy involving heroin or cocaine. See 21 U.S.C. § 846 (1982). Compare 21 U.S.C. § 841(b)(1)(A) (1982) with 21 U.S.C. § 841(b)(1)(B) (1982).⁸ The trial court sentenced Jennings, Cohen and Hurley to terms of seven, ten and four years, respectively as a result of their convictions on Count One. Noting that United States Parole Commission guidelines would suggest that she spend more time in prison for joining a heroin or cocaine distribution conspiracy than for joining a

⁸ These penalty provisions were amended by Pub.L. 98-473, Title II, §§ 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2068, 2069, but the distinctions between permissible penalties for different drug distribution conspiracies remain as significant as they were under prior law. See generally, 21 U.S.C.A. § 841 (West 1985 supp.).

conspiracy to distribute marijuana, Hurley moved at sentencing to strike any references to heroin and cocaine from the presentence investigation report's description of the conspiracy conviction. That motion was denied. Appellants argue that, in the absence of a special verdict indicating which of the four object drugs listed in Count One of the indictment were found to have been objects of the conspiracy of which each was convicted, the court could not know whether the jury had found the defendants guilty of participation in a conspiracy whose objects included the distribution of heroin or cocaine, as the sentencing judge assumed, or whether the jury instead intended to convict the defendants of a conspiracy to distribute only marijuana. As a result, appellants argue, the court erred in denying Hurley's motion to strike from the PSI the language indicating that she had been convicted of participating in a

cocaine or heroin conspiracy, and in imposing upon Jennings and Cohen prison sentences in excess of five years on Count One.9

[4, 5] We find appellants' claim to be without merit.10 Where a section 846 conspiracy count charges the defendants with conspiring to distribute two or more drugs for which Congress has prescribed different ranges within which the sentence imposed may fall, the trial judge should,

9 The government argues that since Hurley was not sentenced to a lengthier term of imprisonment than she could have been sentenced to under the conviction as she construes it, any error in failing to obtain a special verdict or credit her construction of the verdict that was obtained was harmless insofar as she is concerned. Since we find no error, we need not address this argument.

10 In United States v. Harrell, 737 F.2d 971 (11th Cir.1984), a criminal defendant made an argument similar in many respects to the argument made by appellants in this case. Because no contemporaneous objection to the general form of the verdict had been made in that case, however, we did not resolve the substantive issue thus raised. Id. at 982.

by use of a special interrogatory or otherwise, require the jury to return a verdict on the conspiracy count that will indicate clearly on its face which of the charged drugs the defendants were found by the jury to have conspired to distribute. In the absence of such a verdict, it may well be impossible in many cases for the sentencing judge to determine which drugs the jury found to have been involved. In this case, however, the trial court's failure to grant the request for a special verdict did not result in reversible error.

Appellants may not prevail on their claim simply by showing that they were convicted under conspiracy instructions which, on their face, might permit the jury to return a guilty verdict if the conspiracy found did not involve heroin or cocaine. It must also appear that the evidence would support such a construction

of the verdict actually obtained.¹¹ In the absence of the latter, there can be no genuine ambiguity in the jury's verdict, as

¹¹ Those defendants who wish to maintain both that the jury's verdict is ambiguous regarding the drugs that were found to have been involved and that the evidence is insufficient to support a conviction under either reading of the verdict obtained may find it difficult to argue both positions, if they feel obligated to demonstrate both the existence of ambiguity in the jury instructions and an evidentiary bases for the more lenient construction they urge on the ambiguity in the verdict claim. We are confident, however, that the government's counter-argument on the sufficiency of the evidence claim will in most cases suffice to apprise the reviewing court of the strength of the evidence supporting the construction of the verdict that is more favorable to the defendant, as the government will have to concern itself with the possibility that the court will agree with the defendant that the evidence does not support a conviction under the construction that would authorize the stricter sentence. In that event, the government would presumably wish to be certain that it had provided the reviewing court with a basis for sustaining the conviction under the alternative construction that is not as favorable to the government as the one it might prefer, but is better than no conviction on the count at all. The government would thus make the evidentiary showing that the defendant should make in the absence of the sufficiency of the evidence claim. By prudent preventive lawyering, the

any purported ambiguity would only have been created by a reading of the verdict that was not supported by the evidence in the case.12 In this case, we accept appellants' argument that the instructions to the jury on the conspiracy count could be read to allow the jury to convict appellants of the conspiracy charged in Count One of the indictment even if that conspiracy were not found by the jury to have been a conspiracy to distribute cocaine or heroin.13 When the jury's

11 (cont.) government may avoid any inconvenience it might be put to in defending both insufficiency of the evidence and ambiguity in the verdict claims at once by joining rather than opposing the request for a special verdict that the defendant will have to have made in order to place the government in this awkward defensive posture.

12 In other words, under such circumstances, the only ambiguity would appear in the instructions to the jury, read in isolation from the case. That does not, in every case, yield an ambiguous verdict.

13 The court charged the jury on the conspiracy count of the indictment as follows:

verdict is examined in light of the evidence presented at trial, however, there can be no question that the single conspiracy of which all the defendants were convicted was not a conspiracy to distribute only drugs for which no more than five years in prison may be imposed.

13 (cont.)

Count one of the indictment charges that from in or about early 1979 through in or about June of 1984, at Jacksonville, in the Middle District of Florida, that each of the defendants combined, conspired, confederated and agreed together and with other persons to distribute and possess with intent to distribute, quantities of controlled substances, including heroin, cocaine, marijuana and Talwin, in violation of Title 21, United States Code, section 841(a)(1) and 846.

Title 21, United States Code, Section 841(a)(1) cited in this indictment provides in pertinent part as follows: "It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled substance."

Heroin, cocaine, marijuana and Talwin are controlled substances within the meaning of the law.

In order to establish the offense proscribed by this statute, the Government must prove each of the following elements beyond a reasonable

Rather, the evidence is overwhelming that the massive conspiracy charged and proved in this case included among its objectives the distribution of heroin and cocaine.

13 (cont.)

doubt: First, that the defendant knowingly and willfully possessed heroin, cocaine, marijuana or Talwin as charged.

And, second, that he possessed the substance with the intent to distribute it.

To possess with intent to distribute simply means to possess with intent to deliver or transfer possession of a controlled substance to another person with or without any financial interest in the transaction.

Now, section 846 of Title 21 provides in pertinent part as follows: "Any person who conspires to distribute and possess with intent to distribute a controlled substance, shall be guilty of an offense against the United States." So under this law a conspiracy is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of partnership in criminal purposes in which each member becomes the agent of each - every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey or disregard the law.

The evidence in the case need not show that the alleged members of the conspiracy entered into any express or

Appellants have identified no evidence that the conspiracy was limited in its objectives to the distribution of drugs for which only five years imprisonment may be imposed. Further, appellants Jennings,

13 (cont.)

formal agreement or that they directly stated between themselves the details of the scheme and its object or purpose or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods set forth in the indictment were in fact agreed upon to carry out the alleged conspiracy. What the evidence in the case must show beyond a reasonable doubt is, one, that two or more persons in some way or manner positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment. And two, that the particular defendant with whom you are then - whom you are then considering, willfully became a member of such conspiracy.

One may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So if a defendant, with an understanding of the unlawful character of a plan, knowingly and willfully joins in an unlawful scheme on one occasion, that is sufficient to convict him for

Hurley and Cohen were each convicted of substantive offenses involving heroin and

13 (cont.)

conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy.

Of course, mere presence at the scene of an alleged transaction or event or mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together to discuss common aims and interests does not necessarily establish proof of the existence of a conspiracy.

Also, a person who has no knowledge of a conspiracy but who happens to act in a way which advances some object or purpose of the conspiracy, does not thereby become a conspirator.

You are further instructed, with regard to the alleged conspiracy offense, that proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the defendants as to that charge. However, if you are satisfied that such a conspiracy existed, you must then determine who were the

cocaine which appear clearly from the evidence to have occurred pursuant to the distribution conspiracy charged in Count One.14 Taking into consideration the whole

13 (cont.)

members of that conspiracy. If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty, you must find that he was a member of the conspiracy charged in the indictment and not some other separate conspiracy.

14 Hurley and Cohen were found guilty of possession with intent to distribute heroin, cocaine and marijuana, as charged in Count Ten of the indictment. Hurley and Jennings were also found guilty of two counts each of possession with intent to distribute heroin and cocaine. Those offenses were all alleged in the indictment to have occurred within the period of time the conspiracy was alleged to have existed. Although Cohen was not found guilty of a substantive offense involving only heroin and cocaine it is clear that the jury by its verdict on Count Ten convicted her of possessing heroin and cocaine with the intent to distribute the drugs, as the only evidence introduced at trial regarding Cohen concerned her purchases of heroin and cocaine from other members of the distribution conspiracy for the purpose of reselling it.

of the evidence presented at trial as well as the unchallenged verdicts the jury reached on the substantive counts, we find it clear beyond a reasonable doubt that, as the district court concluded, the jury by its verdict found appellants to have joined a conspiracy to distribute heroin and cocaine. We therefore reject appellants' claim that the court erred in sentencing the defendants as it did on the conspiracy count and in denying appellant Hurley's motion to strike certain material from her PSI.

The government opposed the defense request for a special verdict, see supra note 7, and has argued on this appeal that such a procedure would have been inappropriate. Although special verdicts have, for good reason, long been disfavored generally in the criminal law, see generally United States v. Spock, 416 F.2d 165, 180-83 (1st Cir.1969), they have commonly been approved where necessary to

determine the punishment that should be imposed. See e.g., Jalbert v. United States, 375 F.2d 125, 126 (5th Cir.), cert. denied, 389 U.S. 899, 88 S.Ct. 225, 19 L.Ed.2d 221 (1967). See generally 3 C. Wright, Federal Practice and Procedure § 512 (2d ed. 1982). Moreover, opposing such a motion in a case charging a drug distribution conspiracy in language similar to the terms of the indictment and jury charge in this case appears to serve little useful purpose while risking a great deal. In this case, we are able to conclude beyond a reasonable doubt that the jury intended to convict the defendants of a heroin/cocaine distribution conspiracy on the basis of the overwhelming strength of the evidence in support of that construction, to the exclusion of the construction urged by appellants, and the verdicts returned on the related substantive counts charged in the indictment. But we are confident that it

will be a rare case indeed in which instructions like those given in this case will not result in an ambiguous verdict if evidence relating to both marijuana and heroin or cocaine is introduced and the jury is not asked to indicate expressly which drugs it finds the defendants to have conspired to distribute. This is because the reviewing court in such a situation may not examine the evidence presented at trial to determine whether the jury, if properly instructed, could have or even should have found a heroin/cocaine conspiracy and returned a verdict indicating as much; rather, the court's inquiry is confined to determining beyond any reasonable doubt whether the jury did find such a conspiracy and whether it intended the verdict it returned to reflect that determination. Only in that manner may we avoid invading the special province of the jury in a criminal case both to find the facts and apply the law as it sees fit. Thus the

prosecution's interest in obtaining a jury verdict that will be construed to reflect a finding of a heroin/cocaine conspiracy in any case in which one has been proved can only be frustrated where the government opposes a defense request for a special verdict in a case involving a conspiracy charge similar to the one at issue here.

III. TESTIMONY OF THE GRAND JURY FOREMAN

[6] Appellants Jennings and Cohen argue that the trial court erred in allowing the foreman of the grand jury that indicted the defendants to testify before the jury regarding the materiality of statements they made before the grand jury that were later alleged in the false declaration counts of the indictment to have been false. To prove the offenses charged in the false declaration counts of the indictment, the government had to prove that the allegedly false statements made to the grand jury were "material." 18 U.S.C.

§ 1623(a) (1982).¹⁵ The materiality of the allegedly false declaration is a legal question to be decided by the court rather than an issue of fact for the jury. See United States v. Damato, 554 F.2d 1371, 1373 (5th Cir.1977). As a result, evidence bearing solely on materiality should generally be received outside the presence of the jury. See Harrell v. United States, 220 F.2d 516, 520 (5th Cir.1955). Appellants argue that the trial court thus committed reversible error in allowing the grand juror to testify as he did concerning materiality before the jury. The government responds that the challenged testimony was relevant to other issues

¹⁵ The test of materiality is "whether the false testimony was capable of influencing the tribunal on the issue before it." Blackmon v. United States, 108 F.2d 572, 573 (5th Cir.1940). See also United States v. Damato, 554 F.2d 1371, 1372 (5th Cir.1977); Barnes v. United States, 378 F.2d 646, 649-50 (5th Cir.1967), cert. denied, 390 U.S. 972, 88 S.Ct. 1056, 19 L.Ed.2d 1184 (1968).

properly considered by the jury in this case, and that its admission in the presence of the jury was therefore not error. See United States v. Nixon, 634 F.2d 306, 311 (5th Cir.), cert. denied, 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed.2d 103 (1981).

[7, 8] In this case, however, we need not decide whether the trial court erred in allowing the challenged testimony to be given in the presence of the jury, as no defendant objected to the testimony at trial on the grounds they now urge on appeal. The only objections made to the testimony at issue here were on hearsay and relevance' grounds. The trial court's rejection of those bases for the defendants' objections to the grand juror's testimony is not challenged on this appeal. To preserve an issue at trial for later consideration by an appellate court, one must raise an objection that is sufficient to apprise the trial court and the opposing

party of the particular grounds upon which appellate relief will later be sought. A general objection or an objection on other grounds will not suffice. See United States v. Haynes, 573 F.2d 236, 241 (5th Cir.), cert. denied, 439 U.S. 850, 99 S.Ct. 154, 58 L.Ed.2d 153 (1978); United States v. Hicks, 524 F.2d 1001, 1004 (5th Cir.1975), cert. denied, 425 U.S. 953, 96 S.Ct. 1729, 48 L.Ed.2d 197 (1976). Since the defendants did not object to the grand jury's testimony on the grounds they now urge on appeal, we are limited in our review to reversal on those grounds for plain error. See Fed.R.Crim.P. 52(b). Finding no such error in the admission of the testimony that is challenged on this appeal, we reject appellants' claim for reversal on the grounds set forth above.

IV. THE ADEQUACY OF VOIR DIRE

On the first day of trial, the trial court conducted a lengthy voir dire examination of the panel of prospective

jurors. A principal area of inquiry at voir dire was the extent to which potential jurors had been exposed to and affected by possibly prejudicial pre-trial publicity concerning the case. The court also inquired of the panel whether any of them felt that they might not be able to afford the defendants a fair trial as a result of their opinions about illicit drugs. In response to the court's inquiries, five jurors indicated that they might not be able to render an unbiased decision and were later excused by the court from service. The relevant portion of the voir dire examination is detailed in the trial transcript as follows:

Is there anyone else who has any knowledge about this case from any source whatsoever? If it should develop, if you are selected as a juror, and after you hear some of the evidence in the case, that maybe you might read something about it and just right now don't recall having read about it, but after having heard some of the evidence maybe it might trigger something in your memory as to something you might have read or seen on television or heard on the radio

for that matter, is there anyone here who could not place that outside of their minds and determine this case solely on the basis of evidence which will be presented in this courtroom and the law which I will instruct you to follow at the close of the case? Is there anyone who feels that he could not do that? And if so, please raise your hand. Yes, ma'am.

JUROR: I'm Mrs. Wyckoff. I don't believe I could be impartial in this trial. My oldest child was murdered in a drug killing. I don't really believe I could be impartial.

THE COURT: Miss Wyckoff, the incident about which you speak has nothing to do with any of the defendants in this case?

JUROR: No sir, I'm just - it's my personal feeling.

THE COURT: Now - all right, Miss Wyckoff, you may be seated and thank you very much.

Ladies and gentlemen - I appreciate your telling the Court that, Mrs. Wyckoff.

Ladies and gentlemen, this case involves allegations of conspiracy to possess with intent to distribute various drugs. Does any one of you have any opinions with regard to drugs which makes you feel that you could not give these defendants and the Government a fair and impartial trial?

All right, let's start right in the front row, please.

JUROR: I don't know if I would be fair -

THE COURT: Stand up, please and tell us your name so we can all hear you.

JUROR: I've work[ed] on the railroad as a hostess some years and years back and I've seen what drugs does -

THE COURT: Wait a second, wait a second.

JUROR: Okay. I don't know, I've seen what drugs do to people. I don't know whether I would be biased or not. I might be and I might not be. But I am very much against it, so this is the way I feel about drugs.

THE COURT: What is your name, please?

JUROR: Margaret Bell.

THE COURT: All right, Miss Bell.

All right, on the front row, anyone else?

On the second row to my right, anyone else?

On the third row, anyone else?

All right on the fourth row?

JUROR: Marjorie Rigdon.

THE COURT: Yes, ma'am?

JUROR: I'm not really sure that I could be unbiased or anything

because of my oldest daughter taking drugs.

THE COURT: All right, Miss Rigdon, thank you very much. Have a seat.

Anyone else? Yes, Sir.

JUROR: Noah S. Simmons. Due to experience that I would care not to discuss right now, I think I would probably find difficulty in being unbiased in a decision where drugs were involved.

THE COURT: All right. Thank you, Mr. Simmons. I appreciate your candor.

Yes, sir.

JUROR: My name is Erich Gussow and I could not render a fair decision for the simple reason my son died three years ago of an overdose and I have some very strong feelings about it.

THE COURT: All right. Thank you, Mr. Gussow.

Appellants moved to strike the entire panel due to the assertedly prejudicial effect on the panel of the statements made by the five panel members who indicated their concerns about possible bias and were later excused. Alternatively, the defendants requested that the remaining

panel members be further examined to determine the prejudicial effect of the statements that were made. That motion was denied, and the court conducted no further inquiry directed specifically at learning the extent of any bias that may have resulted from the panel's exposure to the responses of the five excused jurors. Instead, the court continued its voir dire examination by explaining to the potential jurors that the defendants were presumed innocent until proven guilty and that the presumption of innocence is a guiding principle in the administration of criminal justice. The panel members were asked whether any one of them "could not give these defendants the presumption of innocence and not vote for a guilty verdict unless the Government proved guilt beyond a reasonable doubt." No juror indicated any doubt about his or her ability to respect the presumption of innocence. The court further asked numerous other questions

directed at uncovering any basis for doubting the willingness or ability of any member of the panel to decide the case in accordance with the instruction on the law that would be given by the court. No juror revealed any basis for suspecting bias that was not immediately followed up with specific questions directed at determining the nature and extent of any possible bias.

[9, 10] Appellants argue that the trial court's decision not to examine the panel members individually to determine the extent of any prejudice resulting from the statements made by the five excused jurors was an abuse of discretion.¹⁶ Where

¹⁶ Rule 24(a) of the Federal Rules of Criminal Procedure commits the conduct of voir dire to the sound discretion of the trial court, subject to the essential demands of fairness. See generally United States v. Delval, 600 F.2d 1098, 1102 (5th Cir.1979). This discretion extends to the court's decision whether to ask particular questions of potential jurors as well as its decision whether to examine the panel members individually or as a group. See United States v. Holman, 680 F.2d 1340, 1347-48 (11th Cir.1982).

statements made by potential jurors at voir dire raises the spectre of "potential actual prejudice" on the part of the remaining panel members, "specific and direct questioning is necessary to ferret out those jurors who would not be impartial." United States v. Corey, 625 F.2d 704, 707 (5th Cir.1980), cert. denied, 450 U.S. 925, 101 S.Ct. 1377, 67 L.Ed.2d 354 (1981). See also United States v. Nell, 526 F.2d 1223, 1229-30 (5th Cir.1976). Where "the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present," however, not abuse of discretion may be found. United States v. Holman, 680 F.2d 1340, 1344 (11th Cir.1982) (quoting United States v. Nell, 526 F.2d at 1229).

[11] In United States v. Tegzes, 715 F.2d 505 (11th Cir.1983), we found this standard satisfied in a case that presented essentially the same issue we are faced

with here. In that case, one juror stated during voir dire that "A very dear friend of mine has not left his house in seven years because of brain damage from drugs." Id. at 506. As a result of this statement and other statements made by other jurors concerning experiences with drugs, the court inquired whether any panel member held a belief or opinion regarding drug offenses that would render it impossible for him or her to serve as a fair and impartial juror. One juror, who was subsequently excused for cause, stated that because of his opinions and beliefs concerning drugs he could not serve fairly and impartially. Later, during the selection of alternate jurors, a prospective alternate said "I did see my youngest son, through dope, OD before he was 18 years old." Id. The defendant moved for a mistrial on the grounds that the prospective alternate's statement had tainted the other jurors on the panel. The trial judge

dismissed the juror but denied the motion for a mistrial. The court also refused a request to question the jurors individually or collectively to determine the impact the excused alternate's remarks had on the ability of the remaining jurors to be fair and impartial. Id. We held that the court did not err in its conduct of voir dire, explaining our decision as follows:

Ms. Wade's remark does not raise the spectre of potential prejudice in other jurors that would require the court to ask additional questions of the panel. The statement did not constitute an opinion concerning the guilt or innocence of the defendants, nor did it relate to knowledge about the facts, parties, or witnesses involved in this case. The fact that other jurors may now know that criminal conduct leads to tragic results does not constitute "potential actual prejudice" toward the accused. Appellants' suggestion that mere awareness of the adverse consequences of crime induces bias toward the defendant is highly speculative and falls far short of the potential actual prejudice which would mandate additional voir dire.

Id. at 508. In this case, too, we find the statements made by the five panel members who were excused to have been insufficient

to require the court to conduct additional voir dire of the remaining panel members. At most, the statements served to heighten the remaining jurors' awareness of some of the possible consequences of drug use. We are not convinced that they posed any threat to the fairness and legality of the defendant's trial.

Appellants also challenge the adequacy of the trial court's inquiry into the racial attitudes of the prospective jurors at voir dire. All of the defendants in this case are black, as were the majority of the witnesses called by the government. The defendants were charged with engaging in a conspiracy to distribute drugs in a predominantly black community in Jacksonville. The panel of prospective jurors, like the jury chosen for the trial, was predominantly white. Although appellants submitted a number of questions directed at revealing any effect that racial prejudices were likely to have on

the jury's deliberations, the court asked of the jury only the following:

Ladies and gentlemen, each of the defendants in this case is a black citizen. Would any of you fail to give the defendants the same fair trial that you would give anyone else, solely because of their race?

No juror responded, and voir dire proceeded on to other areas of inquiry. Appellants argue that the circumstances of this case required the trial court judge to conduct a more thorough investigation into the racial attitudes of the prospective jurors.

[12, 13] Failure to honor a request for voir dire into racial attitudes that is more searching than that conducted in this case will constitute reversible error "only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury."

Rosales-Lopez v. United States, 451 U.S. 182, 191, 101 S.Ct. 1629, 1636, 68 L.Ed.2d 22 (1981). Thus, where the government or

the defendant is expected to place in issue at trial matters involving allegations of racial or ethnic prejudice, or where the circumstances of the case reveal a violent criminal act perpetrated against a victim of a different racial or ethnic group, the Supreme Court had indicated that general inquiries like the inquiry made in this case may not suffice. Id. at 191-92, 101 S.Ct. at 1635-36. The mere fact that the jury is predominantly of one racial ethnic group, while the defendants, most of the witnesses and the alleged victims of the offense are of another, however, is clearly insufficient to require further voir dire. Those are not circumstances that alone create a "reasonable possibility" that racial or ethnic prejudice will influence the jury. We therefore find no reversible error in the conduct of voir dire in this case.

V. ADMISSION OF PLEA AGREEMENTS

The first witness called by the government was Johnny Bernard McClenton. The terms of McClenton's plea bargain agreement with the government were discussed without objection on direct examination. On cross-examination, defense counsel attacked McClenton's credibility, making repeated and specific references to the plea agreement. On re-direct, the government introduced, over defense counsel's objections, McClenton's written plea agreement. Defense counsel objected to the introduction of the exhibit on the grounds that it was a self-serving document prepared by the government in anticipation of this litigation, and that it was cumulative and repetitious. On the last day of the prosecution's presentation of its case in chief, Patricia Porter was called to testify. The government moved to introduce Porter's written plea agreement during her direct examination. The exhibit

was admitted over defense counsel's objection that it was self-serving. In his closing argument, the prosecutor referred to the McClenton plea agreement as follows:

[McClenton's] looking at an aggregate sentence of up to twenty years. He could get less, but that's going to be Judge Moore's job to decide, and Johnny McClenton knows that his plea agreement is in this case and you can look at it. If he fails to tell the truth, he has everything to lose. That plea agreement can be taken away from him. The United States can say, Mr. McClenton, you still have to plead guilty to what you pled to and we can charge you with all the things that were dropped against you. He has every reason in the world to tell the truth and no reason in the world to tell a lie.

According to appellant, the admission of the written plea agreements into evidence, in combination with this reference at closing argument (to which no objection was made at trial), impermissibly bolstered the credibility of the witnesses who plea agreements were introduced.¹⁷

¹⁷ The government has argued that the objections to the admission of the plea

In United States v. Sims, 719 F.2d 375, 377-78 (11th Cir.1983), cert. denied, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984), we considered and rejected a similar claim. We held that the government had not improperly vouched for the veracity of a testifying co-conspirator by introducing the terms of the witness' plea

17 (cont.) agreements that were made by the defendants at trial were insufficient to apprise the trial court of the asserted ground for excluding the documents that we address in this part of our opinion. The government argues, therefore, that the improper vouching argument was not properly preserved for appellate review. See United States v. Haynes, 573 F.2d at 241; United States v. Hicks, 524 F.2d at 1004. Having examined the transcript, we are satisfied that, under the circumstances, the trial court was adequately informed of the grounds for excluding the documents that we consider here.

The government also argues that if the documents should not have been admitted, their admission nonetheless did not prejudice the defendants at trial, as testimony regarding the terms of the plea bargain agreements had been admitted without objection. Because we find the admission of the plea bargain in agreement to have been permissible, we need not address this argument.

agreement and referring to the agreement at closing argument. We suggested there, however, that the prosecutor had been "indiscreet" in stating in closing argument that the witness "had to testify as to the truth" because "he could still be prosecuted for perjury." Id. at 378. Appellants argue that while the prosecutor's brief reference to the plea agreement in his closing argument in Sims did not render its admission reversible error, the extended comments made by the prosecutor in this case distinguish this case from Sims and render the admission of the written plea agreement reversible error.

[14-16] The applicable law was well stated in Sims:

"Attempts to bolster a witness by vouching for his credibility are normally improper and error." United States v. Ellis, 547 F.2d 863, 869 (5th Cir. 1977). The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility.

United States v. Roberts, 618 F.2d 530, 537 (9th Cir.1980) (citing Ellis, supra). This test may be satisfied in two ways. First, the prosecution may place the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity. See United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972); Gradsky v. United States, 373 F.2d 706, 709-10 (5th Cir.1967). Secondly, a prosecutor may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony. See United States v. Brooklier, 685 F.2d 1208, 1218 (9th Cir.1982) (explaining United States v. Roberts, 618 F.2d 530 (9th Cir.1980)).

Sims 719 F.2d at 377.

Appellant Dennis argues that the "obvious implication" of the admission and subsequent use of the plea agreements at closing argument was that "the Government knew something the jury didn't, and could therefore guarantee that McClenton would not lie." Appellant appears to reach this conclusion on the basis of the provisions in the plea agreement that required the witnesses to testify truthfully in order to gain all the benefits of the plea bargains they had made. According to appellant,

such an agreement suggests to the jury that the government had some independent, unstated means of verifying the truth of the witness' testimony so that the government could determine whether the terms of the agreement had been fulfilled. As a result, appellant argues, the agreements between the government and its witnesses in this case had the same effect as a personal assurance from the prosecutor indicating that he had by some non-record means ensured that the witness has testified truthfully.

[17] The fact that the witness had promised, as part of his plea bargain agreement, to testify truthfully was precisely what was held not to have been erroneously admitted in Sims. Under Sims, appellant's challenge, to the extent it is directed at the plea agreements themselves,

must fail.¹⁸ With his remarks the prosecutor in this case, as in Sims, added nothing significant to what was already clear from the face of the plea agreement. We are not persuaded that the prosecutor's comments in this case suggested that the government had access to some means for determining whether the witness was testifying truthfully that was not available to the jury. We thus adhere to the principle, implicit in Sims, that where the plea agreement is properly admitted, accurate comment thereon by the prosecutor

¹⁸ As we have held in this case, the plea agreements were not inadmissible on the ground that they were introduced for an improper purpose. It is also clear that, the possibility of improper vouching aside, the agreements were admissible for the purpose for which they were introduced. "Where, as here, the codefendant is a witness at trial, subject to the rigors of cross-examination, disclosure of the guilty plea to blunt the impact of attacks on her credibility serves a legitimate purpose and is permissible." United States v. Melton, 739 F.2d 576, 579 (11th Cir.1984) (quoting United States v. Veltre, 591 F.2d 347, 349 (5th Cir.1979)).

in closing argument does not constitute reversible error.

VI. PROPRIETY OF THE PROSECUTOR'S REBUTTAL ARGUMENT

[18] Appellant, Hurley claims that the trial court erred in refusing to declare a mistrial after the prosecutor, in his rebuttal argument, responded to a defense challenge to the character of a government witness as follows:

[Counsel for Hurley] spent a lot of time telling you how horrible a person [the witness] is compared to Brenda Hurley.— Brenda Hurley is a person, though, that accepted two hundred dollars a month to let heroin and cocaine stay in the bedroom of her little girl.

Hurley characterizes this as an improper government attack on her character, which she had not placed in issue in the case. Hurley argues that because the prosecutor's improper argument prejudicially affected her substantial right not to be attacked in this manner, the trial court erred in denying her timely motion for a mistrial. See United States v. Zielie, 734 F.2d 1447,

1460-61 (11th Cir.1984), cert. denied,
____ U.S.____, 105 S.Ct. 957, 83 L.Ed.2d 969
(1985).19

Although we do not necessarily approve of the prosecutor's remark, it does not constitute grounds for reversal of Hurley's conviction. The prosecutor's comment, although obviously intended to reflect on the character of the defendant, was based on properly admitted evidence that was directly relevant to the determination of whether Hurley committed the conspiracy offense for which she was being tried.20

19 Hurley did not object to the prosecutor's comments when they were made, but moved for a mistrial on the grounds urged here immediately after the jury had left the courtroom to deliberate. The government argues that Hurley's objection to the prosecutor's argument, first articulated in the motion for mistrial, was not timely made. This argument is clearly without merit. See United States v. Dorr, 636 F.2d 117, 120 (5th Cir.1981).

20 Although Hurley claims a lack of evidentiary support for the prosecutor's assertion, it was adequately supported in the record, as the inference that the trunk kept in her daughter's room had heroin and cocaine in it could fairly be drawn from the testimony given.

This is not a case in which the evidentiary basis for the attack on the defendant's character was improperly admitted or was not in evidence at all. The prosecutor was fully entitled to argue the truth of the comment he made, as it was a major component of the government's case against Hurley on the conspiracy count of the indictment; his only error, if it was error, was in suggesting that the evidence reflected upon the defendant's character as well. Under such circumstances, we cannot find the prosecutor's remark, if it was improper, to have prejudiced Hurley to a degree sufficient to warrant reversal of her conviction, particularly in light of the considerable strength of the evidence against her. See United States v. Phillips, 664 F.2d 971, 1030-31 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).

VII. THE GOVERNMENT'S USE OF ITS PEREMPTORY CHALLENGES

[19] The government used peremptory challenges to strike three black males from the jury panel. In each instance, defense counsel requested that the trial court inquire into the government's reasons for striking the prospective jurors. Those requests were denied. Two blacks were eventually included on the jury that convicted the defendants. Appellants claim, however, that the record revealed no legitimate basis for excluding the three blacks who were removed from the jury panel; indeed, according to appellants, the panel members' responses at voir dire indicated that they would be less inclined than the average individual to exhibit any particular sympathy toward criminal defendants. Appellants argue that they have thus established a prima facie case in support of their claim that blacks were unconstitutionally excluded from the jury

that convicted them, and that the government should now be required to provide an explanation for its use of peremptory challenges that is sufficient to rebut the presumption that the defendants' sixth amendment right to a jury drawn from a fair cross-section of the community has been violated.

Since the Supreme Court's decision in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), we have adhered to its requirement that one seeking to assert a constitutional claim on the basis of the government's use of peremptory challenges demonstrate that the prosecutor was responsible for removing blacks in "case after case" in order to make out such a claim. Id. at 223-24, 85 S.Ct. at 837-38. See Willis v. Zant, 720 F.2d 1212, 1219 (11th Cir. 1983), cert. denied ___ U.S. ___, 104 S.Ct. 3546, 82 L.Ed.2 849 (1984); United States v. Durham, 587 F.2d 799, 801 (5th Cir.1979); United States v.

Carlton, 456 F.2d 207, 208 (5th Cir. 1972). As we have noted recently, however, see Jordan v. Lippman, 763 F.2d 1265, 1283 (11th Cir. 1985), five Justices of the Supreme Court have expressed some doubt about the continuing vitality of Swain, see McCray v. New York, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) (opinion of Stevens, J., with whom Blackmun, J., and Powell, J., join, respecting the denial of the petition for writs of certiorari); Id. at 963, 103 S.Ct. at 2439 (Marshall, J., with whom Brennan, J., joins, dissenting from the denial of certiorari), and the Second Circuit has limited Swain's analysis to the equal protection context, formulating a different test for determining a similar sixth amendment challenge. See McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984). The Supreme Court has recently granted certiorari in a case presenting this issue. See Batson v. Kentucky, cert. granted, ___ U.S. ___, 105

S.Ct. 2111, 85 L.Ed.2d 476 (1985). In pressing this claim, appellants ask that we adopt the analysis set forth by the Second Circuit in McCray. In that case the court concluded that:

[I]n order to establish a prima facie violation of his right to the possibility of a fair cross-section in the petit jury, the defendant must show that in his case, (1) the group alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliations rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.

McCray, 750 F.2d at 1131. In the Second Circuit, once the defendant has established such a prima facie case, the burden shifts to the prosecutor to rebut the presumption of unconstitutional action by showing that the result was produced by permissible racially neutral selection criteria and procedures. Id. at 1131-32. The government argues that we should not adopt the analysis of McCray at that, even if we

did, appellants have not made out a prima facie case in support of their constitutional claim, as two blacks were members of the jury that convicted them.²¹

We do not find the comments made by the members of the Supreme Court who wrote concerning the denial of certiorari in McCray v. New York, sufficient to undermine the precedential authority of our prior cases, in which we have adhered strictly to Swain in the equal protection context and refused to apply less rigorous standards to similar claims based on the sixth amendment. See e.g., Willis v. Zant, 720 F.2d at 1219.²² A panel of this court may

²¹ The defendant in McCray was tried before an all white jury. See McCray, 750 F.2d at 1115.

²² The decision we reach is not inconsistent with the decision in United States v. Hawkins, 781 F.2d 1483, 1484-87 (11th Cir. 1986), which was published while this opinion was being prepared. In that case, too, the court did not decide "whether or under what circumstances the racially motivated use of peremptory challenges would require reversal," at

not disregard binding prior circuit authority in the absence of intervening Supreme Court precedent that changes the law. See, e.g., Wilson v. Taylor, 658 F.2d 1021, 1034 (5th Cir. Unit B 1981).²³ Thus even if we were persuaded by the arguments that have been made in support of a departure from the Swain analysis in this context, we could not, consistently with the law of this circuit, depart from our own prior precedent in this area.²⁴

²² (cont.) 1487, recognizing that the Supreme Court has recently granted certiorari in a case raising that issue.

²³ This circuit has adopted as precedent all decisions of Unit B of the former Fifth Circuit. Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982).

²⁴ It is clear that, even if we were not bound by Swain and its progeny in this context, appellant could not prevail on their claim. The government utilized only three of the six peremptory challenges it was allowed during the selection of the twelve jurors who decided the case, and one of the two challenges to alternates that it was allowed. The government exercised two of the three challenges it exercised when

VIII. REMAINING ISSUES

[20-24] The remainder of appellants' claims are clearly without merit and do not warrant extended discussion. The evidence was more than sufficient to convict appellant Dennis of engaging in a continuing criminal enterprise, in

24 (cont.) selecting regular members of the jury to strike potential jurors who were black, and used the one challenge it chose to exercise when selecting alternate jurors to strike an alternate who was black, but eventually accepted a jury that included among its regular members two blacks. It is thus obvious that the government did not attempt to exclude all blacks, or as many blacks as it could, from appellants' trial jury. Moreover, the unchallenged presence of two blacks on the jury tends to rebut any presumption of racial discrimination that might be argued to arise from the prosecutor's use of three of the four peremptory challenges he exercised to remove blacks from the panel of potential jurors and alternates. The fact that one of three blacks who were challenged and the mother of another had been victimized by burglars in the past in no way suggests that the prosecutor's challenges to those jurors were based on their race. We thus conclude that, although we cannot know with absolute certainty whether the prosecutor was influenced in his exercise of peremptory challenges by racial criteria, appellants have not demonstrated a substantial likelihood that the government exercised

violation of 21 U.S.C. § 848 (1982). His sentence of thirty years imprisonment for committing that offense, for which he could have been sentenced to life imprisonment without parole, was not excessive under the eighth amendment to the Constitution. Moreover, it was not improper for the trial court to impose cumulative sentences on Dennis for the continuing criminal enterprise offense and for the predicate substantive narcotics offenses. See United States v. Garrett, 727 F.2d 1003, 1010 (11th Cir.1984), aff'd, ___ U.S. ___, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985). The trial court's remark to the jury on the day the government rested its case, explaining

24 (cont.) its peremptory challenges in a manner that was designed to dilute the representation of blacks on the trial jury. Thus we would find that appellants have not made out a prima facie case of racial discrimination in the government's use of its peremptory challenges even if we were not foreclosed from considering such a claim by Swain and other precedent that is binding upon this panel.

that the court would be in recess until the following day to allow defense counsel "to get their ducks in a row and so forth," was not a constitutionally impermissible comment on any defendant's decision not to testify or present evidence, nor would it naturally and necessarily have been construed as such. See United States v. Haynes, 573 F.2d 236, 239 (5th Cir.), cert. denied, 439 U.S. 850, 99 S.Ct. 154, 58 L.Ed.2d 153 (1978). Finally, the court did not abuse its discretion when, having just continued the trial for one week, it denied appellant Cohen's motion for an indefinite continuance to allow her further time to prepare for trial.

CONCLUSION

For the reasons set forth above, the judgment appealed from is AFFIRMED in its entirety.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bobby Roy DENNIS, Sr., Sharon Denise
Cohen, Clarence Bobby Jennings,
Brenda Jewell Hurley,
Defendants-Appellants.

No. 85-3089.

United States Court of Appeals,
Eleventh Circuit.

Nov. 24, 1986.

William J. Sheppard, Courtney L.
Johnson, Jacksonville, Fla., for Dennis.

Brent D. Shore, Jacksonville, Fla.,
for Cohen.

Eugene F. Murphy, Jacksonville Beach,
Fla., for Jennings.

Howard W. Skinner, Jacksonville, Fla.,
for Hurley.

M. Alan Ceballos, Asst. U.S. Atty,
Jacksonville, Fla., for the U.S.

Appeals from the United States
District Court for the Middle District of
Florida.

Before HILL, Circuit Judge, TUTTLE*
and HENDERSON, ** Senior Circuit Judges.

* Judge Tuttle was a member of this
panel that heard oral argument, but
due to illness did not participate in

ON PETITIONS FOR REHEARING

(Opinion April 14, 1986, 11th Cir. 1986,
786 F.2d 1029)

PER CURIAM:

Appellants petition for rehearing with suggestion for rehearing en banc. Having reconsidered the initial opinion, the panel has concluded that the petition for rehearing should be GRANTED in part and DENIED in part. The suggestion for rehearing en banc has not been considered by the full court. After filing of this modified opinion, the petition for rehearing en banc may be properly considered by the full court. Accordingly, the petition for rehearing is denied in every respect but the following: Part VII of the opinion, 786 F.2d 1029, 1048-49 (11th Cir. 1986), is stricken in its

* (cont.) this decision. The petition for rehearing is being decided by a quorum.

** See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

entirety and the following is substituted in its stead:

VII. THE GOVERNMENT'S USE OF ITS PEREMPTORY CHALLENGES

The government used peremptory challenges to strike three black males from the jury panel. In each instance, defense counsel requested that the trial court inquire into the government's reasons for striking the prospective jurors to determine whether the prosecutor was exercising his peremptory challenges on the basis of race, in violation of appellants' constitutional rights. Those requests were denied. Two black women were eventually seated on the jury that convicted appellants, who are black.

Appellants claim that the record revealed no legitimate basis for striking the three black males who were removed from the jury panel; indeed, according to appellants, the responses of two of the three at voir dire indicated that they

would be less inclined than the average individual to exhibit any particular sympathy toward criminal defendants. Appellants argue that they have thus made out a prima facie case in support of their claim that black males were unconstitutionally excluded from the jury that convicted them, and that the government should now be required to provide a nondiscriminatory explanation for the exercise of the three peremptory challenges it utilized to strike the three black males who were on the venire.

Appellants rely on the recent decision of the Supreme Court in Batson v. Kentucky, __U.S.__, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), in support of their claim.²¹ In that case the Court held that, where a defendant is able to make out a prima facie

²¹ Appellants base their claim on the fifth and sixth amendments to the Constitution. Although Batson involved a constitutional challenge based on the equal protection clause of the fourteenth

case of unconstitutional discrimination by the prosecutor in the exercise of his peremptory challenges in the defendant's case, the prosecutor should be required by the trial court to offer a neutral explanation for the allegedly discriminatory challenges that is related to the particular case to be tried. The Supreme Court stated that a defendant could establish a prima facie case of purposeful discrimination as follows:

[T]he defendant first must show that he is a member of a cognizable racial group, Castaneda v. Partida, [430 U.S. 482, 494, 97 S.Ct. 1272, 1275, 51 L.Ed.2d 498 (1977)], and that the

21 (cont.) amendment, it seems clear that the holding and rationale of that case should also be used to determine similar fifth amendment claims that are raised by defendants who have been tried in federal court. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed.884 (1954). We are constrained by binding Eleventh Circuit authority, however, to reject appellants' invitation to grant the relief they seek on sixth amendment grounds, should equal protection prove unavailing. Willis v. Zant, 720 F.2d 1212, 1219 n. 14 (11th Cir.1983).

prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Avery v. Georgia, [345 U.S. 559, 562, 73 S.Ct. 891 (1953)]. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

21 (cont.) The effect of the Supreme Court decision in Batson v. Kentucky on our decision in this case was first raised in petition for rehearing to which we have invited no response. Subsequently, the Supreme Court has held that Batson should not be retroactively applied when a conviction has been entered and direct appeals have been exhausted. Allen v. Hardy, ___, U.S. ___, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986 (per curiam)). The Court has yet to determine whether Batson is to be applied retroactively to cases pending on direct appeal. See e.g., Brown v. United States, ___, U.S. ___, 106 S.Ct. 2275, 90 L.Ed.2d 718 (1986) (granting certiorari). The petitioner's appeal in the case at bar falls into that pattern category of cases pending on direct appeal at the time Batson was rendered. For the reasons set forth in this opinion, we may dispose of appellants' Batson claim without awaiting the Supreme Court's further resolution of the retroactivity of Batson.

Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. at 1723. In determining whether the defendant has made out a prima facie case of purposeful discrimination, courts are to consider "all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." Id.

[1] In this case, we find it clear that defendants failed to make out a prima facie case of purposeful discrimination.22

22 The Supreme Court in Batson clearly contemplated that the determination of whether a prima facie case under Batson has been made out will ordinarily, if not always, be made in the first instance by the trial court. A remand to the trial court to make such a determination in this case, however, is unnecessary, as a finding by the trial court on this record that

As an initial matter, the relevant cognizable racial group," for the purpose of our analysis, is the group of blacks generally and not just black males, as appellants urge. The test we apply to determine whether appellants are members of a cognizable racial group under Batson is the test applied in Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498, cited in Batson, ___ U.S. at ___, 106 S.Ct. at 1723. Such a group is "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." Castaneda, 430 U.S. at 494, 97 S.Ct. at 1274. The group of blacks generally clearly qualifies under this definition; appellants have failed to

22 (cont.) appellant has presented evidence sufficient to raise an inference of purposeful discrimination would constitute reversible error despite the "great deference" that we must accord the trial court's findings in that regard. Batson, ___ U.S. at ___ n. 21, 106 S.Ct. at 1724 n.21.

show, however, that black males constitute a distinct, recognizable subclass of individuals who have been singled out for different treatment under the laws not simply as blacks, but as black males. It would therefore be inappropriate for us to narrow the "cognizable racial group," for present purposes, to include only black males and exclude black females.

[2] The government utilized only three of the six peremptory challenges it was allowed during the selection of the twelve jurors who decided the case, and one of the two challenges to alternates that it was allowed. The government exercised two of the three challenges it exercised when selecting regular members to strike potential jurors who were black, and used the one challenge it chose to exercise when selecting alternate jurors to strike an alternate who was black, but eventually accepted a jury that included among its regular members two blacks. It is thus

obvious that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury. Moreover, the unchallenged presence of two blacks on the jury undercuts any inference of impermissible discrimination that might be argued to arise from the fact that the prosecutor used three of the four peremptory challenges he exercised to strike blacks from the panel of potential jurors and alternates. Appellants' case is not bolstered by the fact that two of the stricken black venirepersons had previously been victims of burglaries or that one of those two had also testified for the government in the past. We thus conclude that all of the relevant facts and circumstances do not raise an inference of purposeful discrimination on the basis of race, and that appellants were not entitled to any inquiry into the prosecutor's reasons for exercising his peremptory challenges as he did.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3089

D.C. Docket No. 84-127

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BOBBY ROY DENNIS, SR.,
SHARON DENISE COHEN,
CLARENCE BOBBY JENNINGS,
BRENDA JEWELL HURLEY,

Defendants-Appellants.

Appeals from the United States District
Court for the Middle District of Florida

Before HILL, Circuit Judge, and TUTTLE and
HENDERSON*, Senior Circuit Judges.

J U D G M E N T

This cause came on to be heard on the
transcript of the record from the United
States District Court for the Middle

* See Rule 3(b), Rules of the U. S. Court
of Appeals for the Eleventh Circuit.

District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of conviction of the said District Court in this cause be and the same are hereby, AFFIRMED.

Entered: April 14, 1986
For the Court: Spencer D. Mercer, Clerk

By: Miguel J. Cortez
Deputy Clerk

ISSUED AS MANDATE: DEC 4 1986
RE-ISSUED AS MANDATE: DEC 24 1986

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3089

UNITED STATES COURT OF APPEALS,

Plaintiff-Appellee,

versus

BOBBY ROY DENNIS, SR.,
SHARON DENISE COHEN,
CLARENCE BOBBY JENNINGS and
BRENDA JEWELL HURLEY,

Defendants-Appellants.

- - - - -
On Appeal from the United States District
Court for the Middle District of Florida
- - - - -

ON SUGGESTION FOR EN BANC CONSIDERATION

(Opinion April 14, 1986, 11th Cir. 1986,
_____ F.2d _____)

PER CURIAM:

No member of this panel nor other
Judge in regular service on the Court
having requested that the Court be polled
on rehearing en banc (Rule 35, Federal
Rules of Appellate Procedure, Eleventh

Circuit Rule 26), the Suggestion for En
Banc Consideration is DENIED.

ENTERED FOR THE COURT:

James C. Hill

United States Circuit Judge

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

FILED

DEC 24 1986

MIGUEL J. CORTEZ
CLERK

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3089

UNITED STATES COURT OF APPEALS,

Plaintiff-Appellee,

versus

BOBBY ROY DENNIS, SR.,
SHARON DENISE COHEN,
CLARENCE BOBBY JENNINGS and
BRENDA JEWELL HURLEY,

Defendants-Appellants.

- - - - -
On Appeal from the United States District
Court for the Middle District of Florida
- - - - -

O R D E R:

Appellant Bobby Roy Dennis, Sr.'s
motion to clarify by Court order the status
of the pending petition for rehearing en
banc is denied. The mandate has been
recalled; rehearing en banc has been
denied; and the mandate shall issue in due
course.

James C. Hill
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

FILED

DEC 24 1986

MIGUEL J. CORTEZ
CLERK

APR 14 1987

JOSEPH F. SPANOL, JR.
CLERK**In the Supreme Court of the United States**

OCTOBER TERM, 1986

BOBBY ROY DENNIS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

SHARON DENISE COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

BRENDA JEWELL HURLEY, PETITIONER

v.

UNITED STATES OF AMERICA

CLARENCE BOBBY JENNINGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

CHARLES FRIED

Solicitor General

WILLIAM F. WELD

Assistant Attorney General

GLORIA C. PHARES

*Attorney**Department of Justice**Washington, D.C. 20530**(202) 633-2217*

QUESTIONS PRESENTED

1. Whether the district court committed reversible error by failing to require the jury to return a special verdict specifying the controlled substances that were the objects of a distribution conspiracy, when there was overwhelming evidence that the conspiracy charged and proved included among its objectives the distribution of heroin and cocaine, and the defendant was convicted of substantive counts of possession of heroin and cocaine with intent to distribute them (No. 86-6336).

2. Whether petitioners established a prima facie case, under *Batson v. Kentucky*, No. 84-6263 (Apr. 30, 1986), that the prosecutor had improperly exercised his peremptory challenges (Nos. 86-1438, 86-6209, and 86-6544).

3. Whether the district court abused its discretion when, after both sides indicated satisfaction with the jury, the court refused to strike the entire jury panel or to resume questioning the jurors about the effect on them of responses given by other, excused veniremen (Nos. 86-1438, 86-6209, and 86-6544).

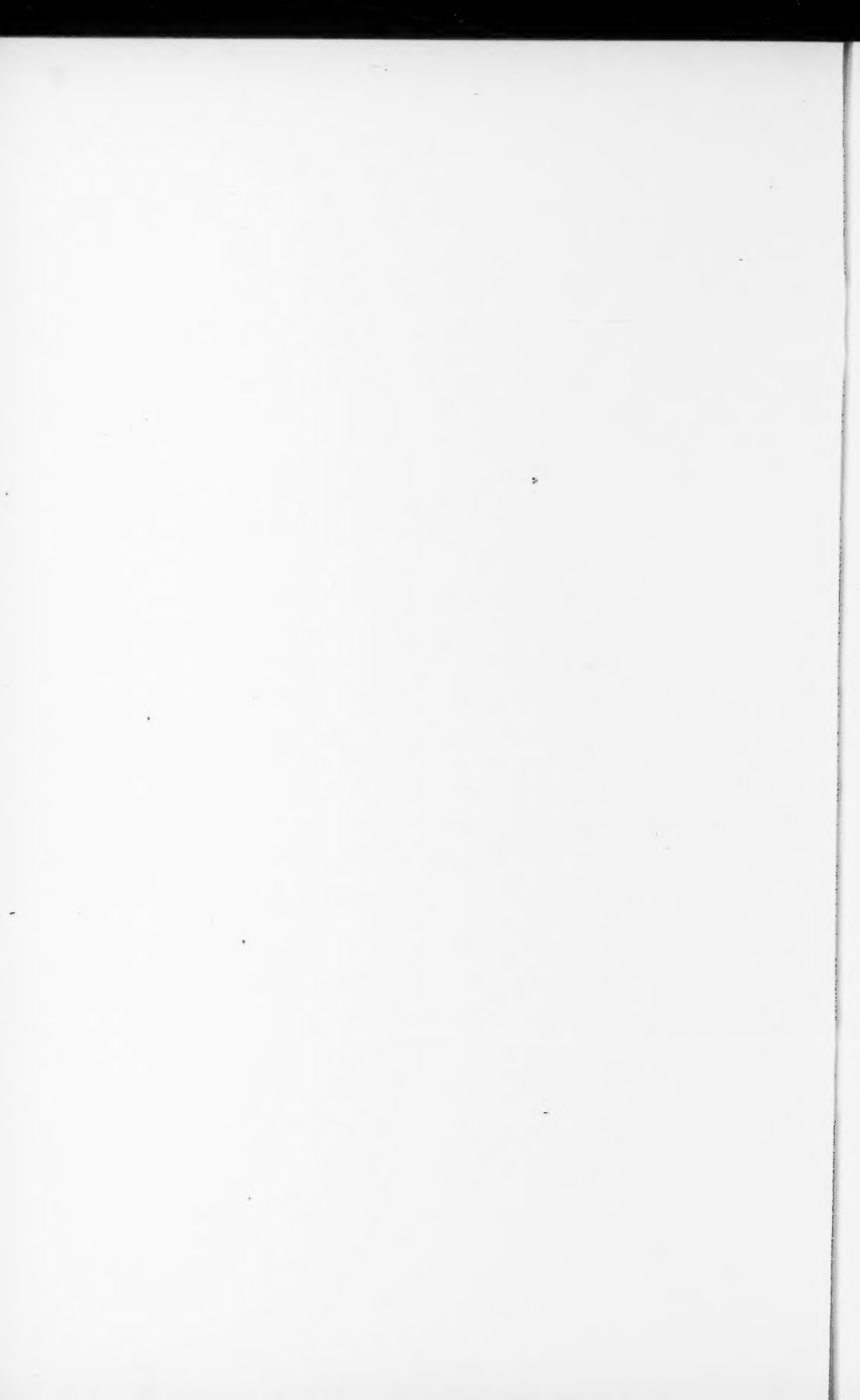


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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1438

BOBBY ROY DENNIS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-6209

SHARON DENISE COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-6336

BRENDA JEWELL HURLEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-6544

CLARENCE BOBBY JENNINGS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

OPINION BELOW

The opinion of the court of appeals (86-6336 Pet. App. A) is reported at 786 F.2d 1029 and, as amended, at 804 F.2d 1208.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1986. A petition for rehearing was granted in part on November 24, 1986, and a suggestion for en banc consideration was denied on December 24, 1986. The petition for a writ of certiorari in No. 86-1438 was filed on February 21, 1987; in No. 86-6209, on January 17, 1987; in No. 86-6336, on February 9, 1987; and in No. 86-6544, on February 25, 1987. The petition in No. 86-6544 is therefore out of time under this Court's Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on a number of related narcotics charges. All four petitioners were convicted on one count of conspiring, in violation of 21 U.S.C. 846, to possess heroin, cocaine, marijuana, and talwin with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (Count 1).¹ In addition, petitioner Dennis was convicted of operating a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 7).² He was also convicted on 15 substantive counts of possession of heroin and cocaine with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (Counts 2, 3, 6, and 8 through 19) and on one count of using the telephone to facilitate the conspiracy, in violation of 21 U.S.C. 843(b) (Count 5). He was sentenced to a total of 44 years' imprisonment and was fined \$50,000.

¹Talwin is a Schedule IV controlled substance that is used in the manufacture of synthetic heroin.

²The district court vacated petitioner Dennis's conviction on Count 1 in light of his conviction on Count 7. 86-6336 Pet. App. 1037 n.5; see *Jeffers v. United States*, 432 U.S. 137, 148-150 (1977) (opinion of Blackmun, J.).

Petitioner Cohen was also convicted on one substantive count of possession of heroin, cocaine, and marijuana with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (Count 10); and on one count of making a false statement before a grand jury, in violation of 18 U.S.C. 1623 (Count 21). She was sentenced to concurrent ten-year terms of imprisonment on Counts 1 and 10, and a consecutive one-year term of imprisonment on Count 21. 86-6336 Pet. App. 1032, 1040 n.14.

Petitioner Hurley was also convicted on four counts of possession of controlled substances with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (Counts 9 through 11 and 16). Those counts included counts charging her with possession of cocaine and heroin with intent to distribute them. She was sentenced to five concurrent four-year terms of imprisonment. 86-6336 Pet. App. 1032, 1038, 1040 n.14.

Finally, petitioner Jennings was convicted on three counts of possession of controlled substances with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (Counts 15 through 17). Those counts included counts charging the possession of cocaine and heroin with intent to distribute them. Jennings was also convicted on one count of making a false statement before a grand jury, in violation of 18 U.S.C. 1623 (Count 20). He was sentenced to a seven-year term of imprisonment on Count 1; a consecutive one-year term of imprisonment on Count 20; and five-year terms of imprisonment on each of Counts 15 through 17, to run concurrently with each other but consecutively to the terms on Counts 1 and 20. 86-6336 Pet. App. 1032, 1038, 1040 n.14.

The evidence at trial showed that, from early 1979 through June 1984, petitioner Dennis and co-defendant Johnny Bernard McClenton jointly supervised and controlled a massivé and highly lucrative narcotics distribution

enterprise (86-6336 Pet. App. 1032, 1039 n.13).³ The enterprise enlisted the assistance of a number of young women who packaged and stored drugs in their homes or apartments, frequently in return for payment of their rent or household expenses. The organization also employed street-level "lieutenants" who retrieved the packaged narcotics from the homes where they were stored, and delivered them to street-level sellers (*id.* at 1032).

Petitioner Hurley stored marijuana, cocaine, and heroin in her apartment for several months in 1982, and the enterprise operated out of that location at the time. Petitioner Cohen was a street-level seller and sold cocaine and heroin out of her home. Petitioner Jennings was a street-level lieutenant. 86-6336 Pet. App. 1032.

2. a. Petitioners are black. The government exercised three of the six peremptory challenges it was allowed during the selection of the jurors who decided the case, using two to challenge blacks. The government exercised one of the two peremptory challenges it was allowed during selection of the alternates, using that challenge to strike a black. 86-6336 Pet. App. 542. In each instance, defense counsel requested that the district court inquire into the government's reasons for striking the prospective jurors to determine whether the prosecutor was exercising his peremptory challenges on the basis of race (*id.* at 541). Those requests were denied (*ibid.*).

Two black women were eventually seated on the jury that convicted petitioners (86-6336 Pet. App. 542-543). None of the defense counsel made a claim that the prosecutor was striking jurors based on their gender.

³ McClenton pleaded guilty and testified for the government at trial (86-6336 Pet. App. 1032).

b. The district court conducted a lengthy voir dire examination of the panel of prospective jurors. A principal area of inquiry was the extent to which potential jurors had been exposed to and affected by pretrial publicity about the case. In addition the court inquired whether any panel member felt he might not be able to give petitioners a fair trial as a result of his opinions about illicit drugs. 86-6336 Pet. App. 1042. Five jurors indicated that they might not be able to render an unbiased decision. The child of one venireman had been murdered in a drug killing; the child of another had died of a drug overdose; and the daughter of a third was a drug user. *Id.* at 1042, 1043. A fourth venireman explained that his bias stemmed from seeing the effects of drugs on his co-workers, and the fifth stated that, from "experience that I would care not to discuss right now," he did not think he could be unbiased (*id.* at 1043). The five were excused for cause.

The court continued its examination of the venire to determine whether any member would have difficulty honoring the presumption of innocence and requiring the government to prove its case beyond a reasonable doubt. The court also asked whether the jurors would decide the case in accordance with the instructions on the law that the court would give. Whenever any juror revealed anything suggesting possible bias, the court followed up with specific questions directed at determining the nature and extent of any possible bias on that juror's part. After both sides had accepted the jury and the jurors had been excused for the day, petitioners moved to strike the entire panel because of the assertedly prejudicial effect on the panel of the statements made by the five excused veniremen. Alternatively, they requested further examination of the jurors to determine the prejudicial effect of the statements. The district court denied the motion and conducted no further examination of the jury regarding the impact of the statements of the veniremen. 86-6336 Pet. App. 1043.

3. Petitioners raised 11 issues on appeal (86-6336 Pet. App. 1033, 1049). They claimed, among other things, that the district court had erroneously denied the request of petitioners Hurley and Dennis (not joined by petitioners Jennings and Cohen) for a special verdict on Count 1 so that the jury could specify which drugs it found to be the objects of the distribution conspiracy. Petitioners argued that it was not clear what drugs the jury had concluded were the objects of the conspiracy, and that it was therefore error for the district court (1) to refuse to strike statements in petitioner Hurley's presentence report, which would affect her parole guidelines, that she had been convicted of participating in a heroin and cocaine conspiracy, and (2) to impose on petitioner Jennings a prison sentence on Count 1 that exceeded the maximum five years allowed for a distribution conspiracy whose only object is marijuana.⁴ 86-6336 Pet. App. 1037-1038.

Petitioners also argued that the district court abused its discretion by not examining the veniremen individually to determine the extent of any prejudice arising from the responses of the five excused panel members. Finally, petitioners contended that blacks, or black males, were unconstitutionally excluded from the jury because the prosecutor had used peremptory challenges to strike two black males from the prospective jury and one black male alternate without being required to state a racially neutral reason for doing so. 86-6336 Pet. App. 1048.

⁴At the time of petitioners' offenses, in the absence of certain enhancing factors the maximum sentence for possession of marijuana with intent to distribute it was five years' imprisonment and a \$15,000 fine (21 U.S.C. 841(b)(1)(B)), and the maximum sentence for possession of heroin or cocaine with intent to distribute it was 15 years' imprisonment and a \$25,000 fine (21 U.S.C. 841(b)(1)(A)). The allowable penalties for conspiracy to violate Section 841 are identical to the allowable penalties for the substantive offenses (21 U.S.C. 846). The maximum penalties for these offenses were increased in 1984 (Pub. L. No. 98-473, Tit. II, §§ 224(a), 235, 98 Stat. 2030, 2031-2032).

The court of appeals rejected all three claims. First, it held that petitioners could not prevail on their special verdict claim simply by showing that they were convicted on conspiracy instructions that might permit the jury to return a guilty verdict if the conspiracy did not involve heroin or cocaine. It must also appear, said the court, that the evidence would support such a construction of the jury's verdict. 86-6336 Pet. App. 1039. The court accepted petitioners' argument that, as an abstract matter, the jury instructions on the conspiracy count could be read to allow the jury to convict them of the Count 1 conspiracy even if the jury had not found that one of the objects of that conspiracy was the distribution of heroin or cocaine (*ibid.*). Looking at the jury's verdicts on all the counts as well as the evidence presented at trial, however, the court concluded (*id.* at 1039-1040 (footnote omitted)):

[T]here can be no question that the single conspiracy of which all the defendants were convicted was not a conspiracy to distribute only drugs for which [the maximum sentence was] five years in prison * * *. Rather, the evidence is overwhelming that the massive conspiracy charged and proved in this case included among its objectives the distribution of heroin and cocaine. * * * Further, appellants Jennings, Hurley and Cohen were each convicted of substantive offenses involving heroin and cocaine which appear clearly from the evidence to have occurred pursuant to the distribution conspiracy charged in Count One. * * * [W]e find it clear beyond a reasonable doubt that, as the district court concluded, the jury by its verdict found [petitioners] to have joined a conspiracy to distribute heroin and cocaine.

Second, the court of appeals held that the district court used a reasonable procedure for testing the impartiality of the prospective jurors. Moreover, the court held that the

statements of the five excused panel members were insufficient to require the court to conduct additional voir dire of the remaining members. Although acknowledging that the statements might have heightened the remaining jurors' awareness of the possible consequences of drug use, the court concluded that they did not pose any threat to the fairness and legality of petitioners' trial. 86-6336 Pet. App. 1044.

Third, the court of appeals held that petitioners had not established a prima facie case of purposeful discrimination against blacks in the selection of the petit jury. The court initially rejected petitioners' claim on the basis that they had not met the standard of *Swain v. Alabama*, 380 U.S. 202 (1965), while also noting that "we would find that [petitioners] have not made out a prima facie case of racial discrimination in the government's use of its peremptory challenges even if we were not foreclosed from considering such a claim by *Swain*" (86-6336 Pet. App. 1049 & n.24). On panel rehearing in light of this Court's decision in *Batson v. Kentucky*, No. 84-6263 (Apr. 30, 1986), the court held squarely that petitioners had not made out a prima facie case (86-6336 Pet. App. 542).⁵ The court noted that such a decision would ordinarily be made in the district court, but a remand would not be necessary in this case, because the record fell so far short of establishing a prima facie case that a district court finding that petitioners *had* established a prima facie case would constitute reversible error despite the great deference owed to the trial court's findings (*id.* at 542 n.22).

⁵As a threshold issue, the court of appeals held that the cognizable racial group for purposes of this analysis was the group of all blacks, and not just black males, as petitioners had urged (86-6336 Pet. App. 542).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore not warranted.

1. Petitioner Hurley contends (86-6336 Pet. 5-8) that it was error for the district court to deny her request for a special verdict on Count 1 so as to determine the exact scope of the conspiracy of which the jury convicted her.⁶ Although petitioner received a four-year sentence on Count 1, less than the allowable maximum for a conspiracy to distribute marijuana alone, she nevertheless claims prejudice from the absence of a special verdict, because the inclusion in her presentence report of references to heroin and cocaine as objects of the distribution conspiracy has resulted in harsher parole guidelines governing her release (86-6336 Pet. 6).

For reasons stated in our brief in opposition in No. 84-409, *Beasley v. United States*, cert. denied, 469 U.S. 1188 (1985), a copy of which is being served on counsel, we believe that it is not error for a trial court to deny a request for a special verdict when an indictment charges a single conspiracy with the objectives of distributing both drugs covered by 21 U.S.C. 841(b)(1)(A) (15-year maximum) and drugs covered by 21 U.S.C. 841(b)(1)(B) (five-year maximum). In brief, we think that the language, structure, and legislative history of Section 841 suggest that the type of controlled substance distributed by the defendant is not one of the elements of a Section 841 offense that must be found by the jury. Instead, the elements for jury determination are described in Section 841(a), which in relevant part makes it

⁶Although petitioner Hurley states (86-6336 Pet. 6) that petitioners Jennings and Cohen join in this argument, neither of those petitioners cross-references the petition in No. 86-6336 or otherwise presents the issue. Thus, we address only petitioner Hurley's argument.

a crime simply to "possess with intent to * * * distribute * * * a controlled substance." Section 841(b) then sets out the sanctions to be applied by the district court when an offense of the type described in Section 841(a) has been proved; it establishes the range of penalties that may be imposed for trafficking in various types of controlled substances. The nature of the substance involved therefore is relevant only to the trial judge's sentencing determination.⁷ The judgment below was therefore correct for the reason (on which the court of appeals did not rely) that the trial judge was right not to require a special verdict.

Nevertheless, even assuming that the district court should have required a special verdict, the court of appeals correctly concluded that its failure to do so was not reversible error in the circumstances of this case. That conclusion is not in conflict with the decision of any other court of appeals.

The record in this case leaves no doubt that the Count 1 conspiracy included an objective to distribute cocaine and heroin. First, some of the substantive possession counts on which petitioner was convicted involved heroin and cocaine only, and it is clear from the evidence that these substantive offenses occurred pursuant to the distribution conspiracy charged in Count 1. Moreover, the evidence was overwhelming that the massive conspiracy charged and proved in this case included among its objectives the distribution of

⁷This conclusion is consistent with the uniform holdings of the courts of appeals that a defendant need not know the precise nature of the drug he possesses in order to violate Section 841(a)(1), which refers only to "a controlled substance." *E.g.*, *United States v. Lopez-Martinez*, 725 F.2d 471, 472-475 (9th Cir.), cert. denied, 469 U.S. 837 (1984); *United States v. Berick*, 710 F.2d 1035, 1040 (5th Cir. 1983), certs. denied, 464 U.S. 899 and 464 U.S. 918 (1983); *United States v. Lewis*, 676 F.2d 508, 512 (11th Cir.), cert. denied, 459 U.S. 976 (1982); *United States v. Morales*, 577 F.2d 769, 776 (2d Cir. 1978); see also *United States v. Norman-deau*, 800 F.2d 953, 956 (9th Cir. 1986).

heroin and cocaine. 86-6336 Pet. App. 1040. In light of the evidence at trial and the unchallenged jury verdicts on the substantive counts, the court of appeals was correct in determining "beyond a reasonable doubt that * * * the jury by its verdict found [petitioner] to have joined a conspiracy to distribute heroin and cocaine" (*ibid.*).

Even on petitioner's theory of the case (86-6336 Pet. 6-8), there is no conflict among the courts of appeals. In *United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir. 1984), for example, there were no substantive possession convictions that might have reflected the jury's judgment that the conspiracy with which the defendant had been involved included cocaine trafficking as one of its objects (732 F.2d at 1083). Nor was there overwhelming evidence showing that the conspiracy count included both cocaine and marijuana; marijuana was the only controlled substance for which proof of at least one specific transaction was offered (*ibid.*). Indeed, the *Orozco-Prada* court distinguished *United States v. Peters*, 617 F.2d 503, 506 (7th Cir. 1980), on factual grounds equally applicable to this case: Peters had been convicted of substantive drug offenses carrying 15-year penalties, thereby evidencing the jury's belief in his guilt of conspiracy to commit those substantive offenses (732 F.2d at 1084).

In *United States v. Quicksey*, 525 F.2d 337, 339-341 (4th Cir. 1975), cert. denied, 423 U.S. 1087 (1976), and *Brown v. United States*, 299 F.2d 438, 439-440 (D.C. Cir.), cert. denied, 370 U.S. 946 (1962), the defendants were not charged with conspiracies to distribute two or more drugs treated differently under Section 841(b), but rather were charged in a single count with conspiracies in violation of two different statutes. It is far from clear that the Fourth or D.C. Circuit would apply these cases in the present context. Moreover, even if they would do so, those cases are not in conflict with the decision below. Neither court remotely

suggested a rule of per se reversal that applies even when the court of appeals examines the evidence and finds "beyond a reasonable doubt" that the defendant committed the more serious of two conspiracies that theoretically could underlie the jury's general verdict.⁸ In the absence of any such suggestion, there is no disagreement among the circuits that requires resolution by this Court.

2. Petitioners Dennis, Cohen, and Jennings all argue (86-1438 Pet. 7-22; 86-6209 Pet. 17-22; 86-6544 Pet. 17-22) that the district court's denial of their request that the prosecutor explain his decision to strike two blacks from the jury and one black alternate conflicts with the Court's decisions in *Batson v. Kentucky*, No. 84-6263 (Apr. 30, 1986), and *Griffith v. Kentucky*, No. 85-5221 (Jan. 13, 1987).⁹ Petitioners are not entitled to rely on this claim because they failed to make the threshold showing that *Batson* requires to establish a prima facie case of purposeful discrimination in the selection of the jury.

⁸Petitioner mischaracterizes the decision below as one in which the court applied the standards of "traditional sufficiency of evidence review" (86-6336 Pet. 8). The court below did not merely inquire whether the evidence was *sufficient* to support a verdict of conspiracy to distribute cocaine or heroin. Rather, it upheld the judgment of the district court only after noting that the evidence was "overwhelming," that the court was convinced "beyond a reasonable doubt" that the jury had found such a conspiracy, and that petitioner had actually been convicted of possession of heroin and cocaine with intent to distribute them. The court of appeals thus took an approach far more akin to "harmless error" review than to "sufficiency" review—an approach that is not in any way inconsistent with the decisions in *Quicksey* and *Brown*.

⁹In addition, petitioner Dennis argues (86-1438 Pet. 14-17) that the court of appeals erred by rejecting his claim that the cognizable group for purposes of *Batson* can be narrowed to include only black men. One simple answer to this claim is that he did not raise this issue in the district court at the time when the district court could have addressed it and thus did not preserve the issue for review. In any event, the decision of the court of appeals, on which we rely, correctly rejected this contention (86-6336 Pet. App. 542), and petitioner cites no authority that

Rejecting the "crippling burden of proof" (*Batson*, slip op. 12) of *Swain v. Alabama*, *supra*, this Court in *Batson* adopted a different test for establishing a prima facie case of racial discrimination by the prosecutor in the selection of the jury. Under the new test, a defendant must first show that he is a member of a cognizable racial group (*Batson*, slip op. 16). Second, he may rely on the presumption that one who is inclined to discriminate will use peremptory challenges to do so (*ibid.*). Finally, the defendant must show that these factors and any other relevant circumstances raise an inference that the prosecutor used the challenges to bar veniremen from the jury on account of their race (*ibid.*). This Court noted that, in evaluating the question, "the trial court should consider all relevant circumstances," including, but not limited to, a "pattern" of strikes against black jurors or questions and statements during voir dire that reflect a racial basis for strikes (*ibid.*). Once a defendant has made his prima facie showing, the burden then shifts to the prosecutor to provide a neutral explanation for challenging black jurors (*ibid.*).¹⁰

supports it. Whatever the merits of *People v. Motton*, 39 Cal. 3d 596, 704 P.2d 176, 217 Cal. Rptr. 416 (1985) (en banc), it is a decision interpreting a state constitution and in any case holds only that black females are a "cognizable group." That holding was based on "the fact that black women face discrimination on two major counts—both race and gender" (39 Cal. 3d at 606, 704 P.2d at 181-182, 217 Cal. Rptr. at 421-422). The holding therefore would contradict, rather than support, any contention that black men suffer similar double discrimination.

¹⁰Petitioner Dennis claims (86-1438 Pet. 17-18) that certain language used by the court of appeals (86-6336 Pet. App. 542-543) departs from *Batson* and requires the defendant to show that the prosecutor attempted to exclude *all* blacks from the jury. The court of appeals did not so hold. The court simply commented that it was "obvious that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury" (86-6336 Pet. App. 543). That observation was not the basis for the court's holding, but was merely one of the factors to which the court looked in finding that petitioners had not met the *Batson* requirement of showing a prima facie case based on "all relevant circumstances" that one or more peremptory challenges had been exercised on the basis of race.

As the court of appeals concluded, petitioners do not meet the *Batson* test. The prosecutor used only two of his six peremptory challenges to strike blacks from the venire. He used a third to strike a white prospective juror.¹¹ Although the prosecutor had three remaining challenges, he did not use them to strike the two blacks who remained on the jury that was sworn. These facts could not support an inference that the prosecutor was trying in any way to minimize the number of blacks on the jury.¹²

Contrary to petitioner Dennis's argument (86-1438 Pet. 19-20), nothing in *Griffith v. Kentucky, supra*, suggests that the foregoing facts make out a prima facie case.¹³ The prosecutor in *Griffith* (who had also been the prosecutor in *Batson*, see *Griffith*, slip op. 12) had available five peremptory challenges and used four of them to strike four of the five prospective black jurors (*id.* at 2). The end result was an all-white jury (*ibid.*). In the present case, the prosecutor had available six peremptory challenges and used two of them to strike two of the four prospective black jurors, forgoing

¹¹The prosecutor also struck a black alternate.

¹²Petitioner Dennis speculates that one of the two black jurors struck from the main jury might have been a desirable juror from the government's point of view because his mother had been a burglary victim, and that the alternate juror challenged by the prosecutor might have been "sympathetic to the prosecution" because he had been a burglary victim and had testified as a government witness in other cases (86-1438 Pet. 7-8; see also 86-6209 Pet. 21; 86-6544 Pet. 21). The proposition that either juror would, because of those experiences alone, be desirable from the government's standpoint in this drug prosecution is dubious to begin with. In any event, it hardly follows from these factors that the only (or likely) explanation for the challenges was the race of the jurors. Any such inference, if it were tenable at all, would be severely undercut by the prosecutor's decision to forgo three of his allotted strikes and accept two black jurors.

¹³We assume for the sake of argument that the facts of *Griffith* constituted a prima facie case, although the Court's decision addressed only the retroactivity of *Batson*.

three of his challenges altogether. Two blacks sat on the jury. The facts of this case simply are not comparable to the facts of *Griffith*.

Petitioner Dennis's apparent suggestion (86-1438 Pet. 20) that a prosecutor must justify every single challenge of a black juror is doubly flawed. First, it overlooks the fact that, before the prosecutor is required to justify any of his strikes, the defendant is required to make a *prima facie* showing of discrimination, a showing that rarely will arise from a single strike.

Second, it relies on a misreading of *Batson*. The Court said that a " 'single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions,' " while making the point that since *Swain* the Court has recognized that a defendant may make a *prima facie* case of discrimination by relying on the facts in his particular case rather than necessarily comparing them to a pattern or practice of discrimination in other cases (*Batson*, slip op. 15, quoting *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 n.14 (1977)). It does not follow, however, that the record must show, without the defendant's having first established his *prima facie* case, an explanation for the prosecutor's strike of each black venireman.¹⁴

¹⁴Petitioner Dennis quotes (86-1438 Pet. 20-21) from the decision in *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986), as if that case stood for the proposition that a prosecutor must explain every strike of a black venireman, without alluding to the defendant's prior burden to establish a *prima facie* case that the prosecutor has improperly used race as a factor in the exercise of peremptory challenges. In fact, however, *David* recognizes that the defendant must make out a *prima facie* case of discrimination before any explanation is required. In any event, if there were any tension between the decision below and either *David* or *Fleming v. Kemp*, 794 F.2d 1478, 1484 (11th Cir. 1986), it would be an intracircuit matter for the court of appeals to resolve. See

3. Petitioners Cohen and Jennings (86-6209 Pet. 3-16; 86-6544 Pet. 3-16) also claim that the district court erred when it refused petitioners' request to strike the entire panel or, in the alternative, to inquire of the prospective jurors whether they were unduly prejudiced by the information they had heard from the excused jurors regarding the effect of drugs on their family members.

It is well settled that a trial judge has broad discretion about how to conduct the voir dire examination. *Rosales-Lopez v. United States*, 451 U.S. 182, 188-189 (1981) (opinion of White, J.); *Aldridge v. United States*, 283 U.S. 308 (1931). The court of appeals reviewed the record in this case and found no abuse of discretion. Only the most extraordinary circumstances would justify this Court in disturbing that discretionary decision, and petitioners have cited none.¹⁵

Wisniewski v. United States, 353 U.S. 901, 902 (1957). It is notable that petitioners' suggestion for en banc consideration received no votes among the judges of the Eleventh Circuit (86-1438 Pet. App. 87-88).

¹⁵Petitioners do not claim a conflict among the courts of appeals, nor is it important, as petitioners suggest (86-6209 Pet. 13-16; 86-6544 Pet. 13-16), that other district courts have handled voir dire in a different manner when faced with similar, or even the same, voir dire issues. See *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States v. Gibbons*, 607 F.2d 1320 (10th Cir. 1979); *United States v. Corbin*, 590 F.2d 398 (1st Cir. 1979); *United States v. Montelongo*, 507 F.2d 639 (5th Cir. 1975); *Patriarca v. United States*, 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969). The essence of committing a particular matter to the discretion of the district court is that, within bounds of reason, two district courts can resolve an issue in different ways, yet both resolutions will be sustained on appeal. In any event, as it observed, the court of appeals had previously found, on facts almost identical to those in this case, that a situation such as the one in this case does not raise the specter of potential prejudice so as to require the district court to ask additional questions of the panel. 86-6336 Pet. App. 1044 (citing *United States v. Tegzes*, 715 F.2d 505 (11th Cir. 1983)).

The voir dire in this case took place over two days. The jurors who were excused for cause described their personal experiences and were excused on the first day of voir dire. At the time they were excused, counsel did not request additional inquiry of the other panel members, and the district court continued its voir dire, which included the instruction that petitioners were presumed innocent until proven guilty and that the presumption of innocence is a guiding principle in the administration of justice. No juror indicated that he would be unable to accord petitioners the presumption of innocence or that he would vote for a guilty verdict if the government had not proved its case beyond a reasonable doubt. Further questions were directed to uncovering any basis for doubting whether the jurors would be able to decide the case in accordance with the court's instructions. No juror revealed any basis for suspecting bias that was not immediately followed by additional questions.

At the end of the day, the jury was found acceptable to both sides, and the court excused the jurors for the night, directing them to return to be sworn the next day. Only at that point, and after they had learned that a district judge in another courtroom had struck a panel when the jurors who had been excused in this case gave the same responses during the selection of another jury, did defense counsel ask for additional questions or to have the jury panel struck. The district court's refusal to take either course was a legitimate discretionary judgment. To return to an issue that had arisen the prior day and delve into the jurors' reactions to the excused veniremen's responses was more likely to enhance the risk of prejudice by drawing attention to the comments. The district court's refusal to do so was no abuse of discretion and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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